

LABOR DECISIONS

Mullenholz, Brimsek & Belair

WORKPLACE SMOKING BRIEFING BOOK 1994

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delay damages for the period of time before the estate had a fee simple.

We must reject that argument because the township could have avoided the delay damages altogether by paying the \$120,000 in condemnation damages into the court¹² (pending the estate's completion of its quiet title actions). The township was not in the untenable position of either violating the township code or becoming liable for delay damages.

Under Code § 611, as noted above, the condemnor must pay delay damages from the date of its possession, and the stipulation establishes that the township took possession of the property on October 26, 1978; therefore, that is the proper date for the computation of delay damages.

The estate, in its brief, argues that it is entitled to interest on the delay damages, calculated from the date of payment of the compensation (August 27, 1979) until the date the township pays the delay damages. The estate has not filed a cross-appeal from the trial court's denial of interest; therefore, the issue is not properly before us.

The order of the trial court, awarding delay damages of \$5,917.81, is affirmed.

ORDER

NOW, April 26, 1983, the order of the Court of Common Pleas of Delaware County, No. 78-15904, dated May 12, 1982, is affirmed.



12. Section 611 of the Eminent Domain Code, 26

COMMONWEALTH of Pennsylvania,
Petitioner,

v.

COMMONWEALTH of Pennsylvania,
PENNSYLVANIA LABOR RELATIONS BOARD, Respondent,

Council 13, American Federation of
State, County and Municipal
Employees, Intervenor.

Commonwealth Court of Pennsylvania.

Argued Dec. 14, 1982.

Decided April 28, 1983.

Commonwealth, as employer of unionized workers of county board of assistance, sought review of order of Labor Relations Board requiring it to cease certain activities. The Commonwealth Court, No. 2167 C.D. 1980, Rogers, J., held that: (1) matter of whether to permit employees' smoking at work stations is not one of inherent managerial policy removed from scope of mandatory bargaining; (2) availability to union of alternative remedy of grievance arbitration did not oust Board of jurisdiction over dispute; and (3) provision of parties' collective bargaining agreement did not have effect of empowering employer to make unilateral changes in working conditions.

Affirmed.

MacPhail, J., dissented and filed opinion, in which Crumlish, President Judge, joined.

Doyle, J., dissented and filed opinion.

1. Labor Relations ⇌ 393

Employer's unilateral accomplishment of a change in working conditions made by statute subject of mandatory bargaining is an unfair labor practice irrespective of whether employer's unilateral action takes place during term of collective agreement or following expiration of such an agreement or during course of negotiations intended to culminate in an agreement.

P.S. § 1-611.

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■ Morelite Equipment Company, 88 Lab. Arb. (BNA)
777 (1987)

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■ National Pen & Pencil, 87 Lab. Arb. (BNA) 1081
(1986)

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■ Schien Body & Equipment Co., 69 Lab. Arb. (BNA)
930

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[3] The Commonwealth next argues that the availability to the union of a contractual grievance arbitration mechanism assertedly broad enough to encompass the instant dispute ousts the PLRB of its subject matter jurisdiction under PERA Section 1301, 43 P.S. 1101.1301

to prevent any person from engaging in any unfair practice listed in Article XII of this act. This power shall be exclusive and shall not be affected by any other means of adjustment or prevention that have been or may be established by agreement, law, or otherwise.

The construction pressed by the Commonwealth flies in the face of the final sentence of Section 1301. Moreover, Judge (later Justice) Wilkinson, could not have more clearly decided this point when he wrote for the Court in *Pennsylvania Labor Relations Board v. General Braddock Area School District*, 33 Pa. Commonwealth Ct. 55, 63, 380 A.2d 946, 950 (1977)

We cannot, therefore, conclude that the PLRB is powerless to investigate charges of unfair labor practices merely because a collective bargaining agreement exists under which grievance arbitration is available for the determination of issues similar to those upon which the charges are based.

Board, 60 Pa. Commonwealth Ct. 29, 430 A.2d 740 (1981), *allocator granted*, September 23, 1981, *appeal denied*, June 27, 1981, that the peculiar characteristics of public education as an enterprise including the necessity that teaching employees serve as role models to the students, rendered private sector authorities concerning employee smoking bans unserviceable in the context of charges filed against a public school district employer who sought to impose such a ban. The Commonwealth does not rely on the *Chambersburg Area School District* case and we do not believe that its authority, so expressly grounded in the characteristics of the enterprise of public education, is applicable to this employer.

2. The NLRB has announced and has more or less consistently followed a practice of deferral to "fair and regular" arbitration proceedings previously conducted, *Spellberg Mfg. Co.*, 112 NLRB No. 139, 36 LRRM 1152 (1955), and has refused to process an unfair labor practice charge if the underlying dispute could be taken

Accord York County Hospital & Home v. AFSCME Local 1485, 57 Pa. Commonwealth Ct. 336, 426 A.2d 1224 (1981). The Commonwealth does not expressly ask us to overrule these cases and we decline to do so as they appear to be required by the clear mandate of the statute and to be consistent with such other authorities as our research has disclosed which bear on the subject.²

Finally, the Commonwealth argues that the PLRB misconstrued a provision of the parties' collective bargaining agreement which provision, in the Commonwealth's view, excuses it from the necessity of bargaining with the union during the contract's term and permits the employer's unilateral action concerning issues which are not expressly included in the contract. The provision, which we are told is commonly incorporated in collective agreements and is denominated as a "waiver" or "zipper" clause, is in its entirety as follows:

The Commonwealth and the Union acknowledge that this Agreement represents the results of collective negotiations between said parties conducted (sic) under and in accordance with the provisions of the Public Employee Relations Act and constitutes the entire agreement between the parties for the duration of the life of said Agreement; each party waiving the

to arbitration, *Collyer Insulated Wire*, 192 NLRB No. 150, 77 LRRM 1931 (1971). However, on review of the occasional NLRB decision not to defer to arbitration it has repeatedly been held that the availability of an arbitral dispute resolution mechanism does not oust the agency's unfair labor practice jurisdiction. *Caterpillar Tractor Co. v. National Labor Relations Board*, 658 F.2d 1242 (7th Cir.1981); *National Labor Relations Board v. General Warehouse Corp.*, 643 F.2d 965 (3d Cir.1981); *Newspaper Guild of Greater Philadelphia, Local 10 v. National Labor Relations Board*, 204 U.S.App. D.C. 278, 636 F.2d 550 (1980).

One commentator has examined these practices and policies of the NLRB in great detail and has concluded that differences in the applicable statutory mandate require the PLRB to disclaim any general deferral policy. Cowden, "Deferral to Arbitration by the Pennsylvania Labor Relations Board," 80 Dickinson Law Review 666 (1977).

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■ United Telephone Co. of Florida, 78 Lab. Arb. (BNA)
865 (1982)

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right to bargain collectively with each other with reference to any other subject, matter, issue or thing whether specifically covered herein or wholly omitted herefrom and irrespective of whether said subject was mentioned or discussed during the negotiations preceding the execution of this Agreement.

The matter of the proper interpretation and application of this provision was the primary subject of the PLRB's opinion accompanying its Order here subject to review. In its opinion, the PLRB discusses in detail previous decisions of that body which have ascribed to provisions like that set forth above an effect of rendering lawful unilateral changes in working conditions made by an employer with respect to matters excluded from the collective agreement executed by the parties. The PLRB then asserts that its interpretation is contrary to the present weight of authority both in the private sector and in the public sector collective bargaining of our sister jurisdictions. By these authorities, a union's waiver of the right to bargain on mandatory subjects during the term of an agreement will not be found in a boiler plate waiver clause alone. Instead, the prevailing view, in the PLRB's analysis, is that such clauses may only be employed as a shield by either party to prevent incessant demands during the contract term made by the other party seeking to alter the status quo. Use of the clause as a sword by one seeking to impose unilateral changes without first bargaining is not favored. The PLRB concludes with its determination to now embrace the majority view and to decide the instant case accordingly.

3. See e.g. *Pepsi-Cola Distributing Co.*, 241 NLRB No. 136, 100 LRRM 1626 (1979); *Unit Drop Forge Division*, 171 NLRB No. 73, 68 LRRM 1129 (1968); *Goodyear Aerospace Corp.*, 204 NLRB No. 119, 83 LRRM 1461 (1973); *North Sacramento School District*, 3 PERC 10079 (N.Y.1978); *Monterey Peninsula Unified School District*, 3 PERC 10147 (Cal. 1978).

4. We note that the parties also included the following "past practices" provision in their agreement.

[4] We have examined the authorities relied on by the PLRB³ and are convinced that it has accurately characterized the conflicting positions and their relative acceptance among the judicial and regulatory bodies that have addressed the debate. Moreover, from our examination of the precise language employed by the parties to express their intention in this regard, we believe it is entirely reasonable for the PLRB to determine that the parties never intended by this provision to permit unilateral mid-term alterations in working conditions.⁴ The PLRB has been charged with primary jurisdiction over, and it is possessed with great expertise in, the resolution of competing concerns and interests among public employees and their employers. We defer to that expertise.

ORDER

AND NOW, this 28th day of April, 1983, the order of the Pennsylvania Labor Relations Board in the above-captioned matter is hereby affirmed.

MacPHAIL, Judge, dissenting.

I respectfully dissent.

While the invocation of the employers' restrictive smoking regulation was unilateral in the sense that management made the change without specific bargaining, the regulation was promulgated by the Commonwealth in response to complaints from employees that smoking at the work-place interfered with the performance of their duties. It must be observed also, that under the regulation smoking was permitted

Employee benefits and working conditions now existing and not in conflict with the Agreement shall remain in effect subject, however, to the right of the Employer to change these benefits or working conditions in the exercise of its management rights reserved to it under Article II of this Agreement.

If the employer's interpretation of the "zipper clause" were accepted, the purpose and effect of this provision would be problematic in the extreme.

APPROVED AND FORWARDED

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in specific designated areas apart from the work-place.

As the majority points out, the crux of this case depends upon a balancing of the employees' interests in the terms and conditions of their employment against the employer's legitimate interest in directing the overall scope and direction of the enterprise. Unlike the majority, however, I would conclude that a ban on smoking at the work-place, when such smoking affects the work quality or productivity of employees, is a matter of inherent managerial policy affecting the scope and direction of the employers' enterprise. In view of the "zipper" clause, see at 456 and the "past practices" clause, see at 457, n. 4, included in the bargaining agreement, I would hold that the implementation of the Commonwealth's smoking regulation did not constitute an unfair labor practice and I would, accordingly, reverse the PLRB.

CRUMLISH, President Judge, joins in this dissent.

DOYLE, Judge, dissenting.

I join in the dissent and would also point out that, in considering the weight to be given on the scale balancing employee conditions of employment on the one hand and matters of inherent managerial policy on the other, the rights of non-smoking employees, and the corresponding obligations of employers, must be considered. See *Smith v. Western Electric Company*, 643 S.W.2d 10 (Mo.App.1983), where the Missouri Court of Appeals recently held that an employee may enjoin his employer from permitting him to be exposed to tobacco smoke in the employee's workplace because of his medical reaction to the smoke. The Court found that the employer had a common-law duty to provide the employee with a safe place to work.



Leonard B. BERKOSKI, Petitioner,

v.

WORKMEN'S COMPENSATION APPEAL BOARD (ATLAS CHAIN & PRECISION PRODUCTS COMPANY, et al.), Respondents.

Commonwealth Court of Pennsylvania.

Argued Nov. 18, 1982.

Decided April 29, 1983.

After sustaining work-related back injury, claimant had received compensation for total disability, and, after returning to work, entered into supplemental agreement with employer which provided for payment of compensation at rate of \$60 per week. Contending that he had suffered new injury and was entitled to greater benefits, claimant filed petition for review of supplement agreement. A referee determined that claimant was in fact entitled to compensation at rate of \$106 per week, but the Workmen's Compensation Appeal Board reversed referee's decision, and claimant appealed. The Commonwealth Court, No. 1978 C.D. 1981, Blatt, J., held that, as claimant introduced no evidence that supplemental agreement was incorrect in material respect and did not even testify as to what purported mistake relating to agreement was, referee's finding was not supported by substantial evidence in record, and it was error for referee to modify or set aside agreement.

Order of Board affirmed.

1. Workers' Compensation § 1155

Workmen's compensation claimant who seeks to modify agreement entered into between claimant and employer has burden of establishing allegations upon which he relies in maintaining that agreement was incorrect in material respect; when he alleges that mistake of fact existed when said agreement was executed, his burden is to prove allegation of mistake.

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■ W-I Forest Prods. Co., 304 N.L.R.B. No. 83 (1991)

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[1] Before commencing our inquiry we note that it is clearly established that the employer's unilateral accomplishment of a change in working conditions made by statute the subject of mandatory bargaining is an unfair labor practice irrespective of whether the employer's unilateral action takes place during the term of a collective agreement or following the expiration of such an agreement or during the course of negotiations intended to culminate in an agreement. *First National Maintenance Corp. v. National Labor Relations Board*, 452 U.S. 666, 101 S.Ct. 2573, 69 L.Ed.2d 318 (1981); *Ford Motor Company v. National Labor Relations Board*, 441 U.S. 488, 99 S.Ct. 1842, 60 L.Ed.2d 420 (1979); *Fibreboard Corp. v. National Labor Relations Board*, 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964); *National Labor Relations Board v. Katz*, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962). See *Pennsylvania Labor Relations Board v. Williamsport Area School District*, 486 Pa. 375, 406 A.2d 329 (1979) (employer's unilateral change in working conditions following the expiration of a collective agreement is an unfair labor practice); *Appeal of Cumberland Valley School District*, 483 Pa. 134, 394 A.2d 946 (1978) (employer's unilateral change during collective negotiations is an unfair labor practice); *Pennsylvania Labor Relations Board v. Mars Area School District*, 480 Pa. 295, 389 A.2d 1073 (1978) (employer's unilateral change during the term of a collective agreement is an unfair labor practice).

Nevertheless, as we have indicated, the Commonwealth here interposes three defenses to the unfair labor practice charge. The Commonwealth first relies on PERA Section 702, 43 P.S. § 1101.702 which provides:

Matters not subject to bargaining

Public employers shall not be required to bargain over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of service, its overall budget, utili-

zation of technology, the organizational structure and selection and direction of personnel. Public employers, however, shall be required to meet and discuss on policy matters affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by public employee representatives.

The proper interpretation of this provision as well as of PERA Section 701, 43 P.S. § 1101.701 which specifies the matters required to be submitted to bargaining as "wages, hours and other terms and conditions of employment," was set forth in *Pennsylvania Labor Relations Board v. State College Area School District*, 461 Pa. 494, 507, 337 A.2d 262, 266 (1975):

Thus we hold that where an item of dispute is a matter of fundamental concern to the employees' interest in wages, hours and other terms and conditions of employment, it is not removed as a matter subject to good faith bargaining under section 701 simply because it may touch upon basic policy. It is the duty of the Board in the first instance and the courts thereafter to determine whether the impact of the issue on the interest of the employee in wages, hours and terms and conditions of employment outweighs its probable effect on the basic policy of the system as a whole. If it is determined that the matter is one of inherent managerial policy but does affect wages, hours and terms and conditions of employment, the public employer shall be required to meet and discuss such subjects upon request by the public employee's representative pursuant to section 702.

The problem, then, in every case presenting the issue of the proper scope of collective bargaining is to weigh the employees' interest in the terms and conditions of their employment against the employer's legitimate interest in directing the overall scope and direction of the enterprise. In *First National Maintenance Corp. v. National Labor Relations Board*, 452 U.S. at 675-676, 101 S.Ct. at 2578-2579, the Court described

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2. Labor Relations ⇌ 389

Subject of whether employees may smoke at their workplaces is at center of those subjects properly described as "conditions of employment," and is entirely unrelated to those entrepreneurial or managerial judgments fundamental to basic direction of enterprise and removed from scope of mandatory bargaining by Public Employee Relations Act section; therefore, imposition of ban on smoking at employees' work stations by a director of county board of assistance constituted a refusal to bargain collectively in good faith. 43 P.S. §§ 1101.702, 1101.1201(a)(5).

3. Labor Relations ⇌ 510

Availability to union of contractual grievance arbitration mechanism assertedly broad enough to encompass dispute over imposition by director of county board of assistance of ban on smoking by employees at their work stations did not oust Labor Relations Board of its subject-matter jurisdiction under section of Public Employee Relations Act to prevent any person from engaging in any unfair practice. 43 P.S. § 1101.1301.

4. Labor Relations ⇌ 257

Parties to collective bargaining agreement did not intend by "waiver" or "zipper" clause to permit unilateral midterm alterations in working conditions.

Robert F. Beck, John D. Raup, Harrisburg, for petitioner.

Cheryl G. Young, James D. Crawford, Chief Counsel, Anthony C. Busillo, II, Frayda Kamber, Pennsylvania Labor Relations Board, Harrisburg, for respondent.

Alaine S. Williams, Jonathan K. Walters, Kirschner, Walters & Willig, Philadelphia, for Council 13.

Before CRUMLISH, President Judge, and ROGERS, BLATT, WILLIAMS, CRAIG, MacPHAIL and DOYLE, JJ.

ROGERS, Judge.

The Commonwealth of Pennsylvania, as the employer of unionized workers of the Venango County Board of Assistance, here seeks review of an order of the Pennsylvania Labor Relations Board (PLRB) requiring it to cease certain activities which the PLRB has determined constitute unfair labor practices within the meaning of Section 1201 of the Public Employee Relations Act (PERA), 43 P.S. § 1101.1201. Specifically, on December 5, 1977, during the term of a collective bargaining agreement effective from July, 1976 until the end of June, 1978, the Executive Director of the Board of Assistance imposed a ban on tobacco smoking by employees at their work stations thereby unilaterally discontinuing a more permissive practice previously applicable. It is not disputed that this ban was imposed and that no attempt was made by the Director prior to its imposition to initiate negotiations on the matter with the exclusive bargaining representative of the employees—intervenor AFSCME District Council 13. The PLRB concluded that this unilateral change in working conditions by the employer during the effective term of a collective bargaining agreement constitutes a "[r]efus[al] to bargain collectively in good faith" prohibited by PERA Section 1201(a)(5), 43 P.S. § 1101.1201(a)(5).

The Commonwealth makes three arguments challenging the legal correctness of the Board's order. First, the Commonwealth asserts that the matter of whether to permit employee smoking at their work stations is one of "inherent managerial policy" expressly removed from the scope of mandatory bargaining by PERA Section 702, 43 P.S. § 1101.702. Second, the Commonwealth contends that the availability to the union of the alternative remedy of grievance arbitration ousts the PLRB of jurisdiction of this dispute. Finally, it is argued that a provision of the parties' collective agreement has the effect of empowering the employer to make unilateral changes in working conditions like that here involved. We will consider these arguments seriatim.

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"If you smoke, ask your foreman where your designated areas will be."

Under the administration of this rule employees have been permitted to smoke on breaks and during their lunch hour in the fabrication, assembly, and work areas of the plant which are not the subject of an absolute smoking prohibition, so long as they were not in the immediate area of acetylene or oxygen tanks. They are not permitted to smoke in these areas during work hours.

The promulgation of this rule has given rise to the instant grievance, which has been signed by some 61 employees and the shop steward. The evidence was that some of the protesting employees were non-smokers. The Union does not protest the designation of absolute no smoking areas which the Company had previously maintained by reason of safety or which have been so designated pursuant to OSHA regulations.

The Company's evidence was that prior to promulgation of the no smoking rule it took into account a substantial body of literature and expert opinion which indicates that smoking may be hazardous to health. In addition, the Company introduced testimony by a physician in support of this proposition. The arbitrator will not burden this decision with a detailed resume of this evidence, which is generally well-known and so well established that the arbitrator could have taken judicial notice thereof. Generally, there is a well established correlation between smoking, most especially cigarette smoking, and respiratory and circulatory ailments, as well as various forms of carcinoma. In addition, there is a growing body of evidence that non-smokers who are substantially exposed to smokers in close quarters may incidentally be exposed to the adverse effects of smoking in degrees not too removed from those to which the smoker, himself, is exposed. According to the Company's physician, smokers may have a higher incidence of absenteeism due to illness, especially during the winter season when smokers are generally more subject to respiratory infections and slower to recover from them, although no precise statistical data was introduced. The Company cited one study where it was noted that OSHA regulations for coke ovens complied with at substantial expense produce lower tar exposure than that an employee is subject to by smoking a single cigarette.

According to the Company, prior to promulgating the rule it had received reports from foremen on a couple of occasions that non-smokers had registered complaints over being exposed to smokers.

In April, 1975, the Company had sustained a rather serious fire to its farm body shop, which then had a wooden roof. This fire occurred during the strike preceding the present contract at nighttime and the cause has not been determined. The Company's present buildings are concrete block and steel as primary structures.

The determination to establish the no smoking rule was apparently made by the Company's Secretary-Treasurer, Norma Schien. There was no prior consultation with the Union before the rule was placed in force and effect. Notwithstanding the Union's protest of the rule, it has been basically observed by the employees and no disciplinary action other than verbal cautions, which have not been recorded in the employees' personnel files, has been administered. Mrs. Schien expressed surprise that the Union did not endorse the rule since the Union is safety cautious. The Union expressed surprise that the Company promulgated the rule since in negotiations the Company had indicated it desired only the minimum amount of rules necessary to efficient plant operation.

According to Union witness Ray King, a shear operator, smoking had been permitted in the shear and fabrication department and dump trailer department in all locations except the acetylene storage area and the office. He stated that fourteen welders, including aluminum welders, worked in the dump trailer department, and welding was done on an occasional basis in the shear and fabrication department. He testified there were considerable smoke fumes from the welding and that the Company did not supply ducts or hoods for the welding operation. He considered the ventilation inadequate with one exhaust fan some 60 or 70 feet from his work area. He testified that customers came into the area and smoked at will during working hours. He indicated that welding was a source of ignition as was the frequent use of grinders, cutting torches, etc.

Roger Motley, an aluminum welder in the main shop building, testified that on breaks the employees could smoke any place except in the bays where batteries

were charged, where diesel fuel was located, at the paint mixing and tool cribs, and the storage areas for oxygen and acetylene bottles. He testified 20 to 25 welders worked in this building and that welding, torch cutting, and grinding was performed, as well as general machine work. He testified that he worked on the east side of the building and the south two bays, and that there was no venting in his area. There were two exhaust fans for the entire main shop and that smoke and fumes from welding was frequently trapped in the area. He is a non-smoker and does not work so close to smokers as to bother him. He testified that customers smoke during working hours in the area and that a truck driver and salesman employed by the Company have been observed to smoke in the area, causing the men to feel discriminated against. The Company's evidence was that the truck driver and salesman had been reprimanded for smoking in violation of the rule, but that customers were permitted to do so, and that the Company intended to enforce the rule against all of its employees, whether or not they were in the bargaining unit.

Union Witness Hamby testified he is a production welder in the farm body shop. He testified that in this area smoking was not permitted in the paint shop, slat room, supervisor's office, and tank storage areas, but that it was during the break periods over about 85% of the area. He stated that there were 15 welders in the building who used welding equipment and cutting torches and performed grinding as sources of ignition. He testified they had been permitted to smoke in the area during work hours for 11 years before the rule was invoked.

According to the Union witnesses, the amount of smoke and fumes in the areas where smoking had previously been permitted had not changed since smoking was prohibited during working hours.

Norma Schien acknowledged that she could not visually detect any change in the atmosphere in the work areas since the rule was imposed, but felt that the environment must be cleaner and healthier. The environment had never been tested by OSHA other than by walk around inspection, but had been approved by the Company's insurers who had tested it on a number of occasions. She stated the environment on those occasions had exceeded minimum standards. She indicated that special exhausting equip-

ment for smoke and fumes from welding was not required, because the minimum height walls in the work area were 16 feet and the ceilings were of additional height because of the thickness of roof trusses. She indicated that smoke and fumes rose to the overhead area leaving the work environment occupied by the men without excessive accumulations of smoke and fumes. She testified that she personally finds smoking offensive and for years had wanted to implement a no smoking rule, which she felt to be in the best interests of the men. She testified that tobacco chewing had been prohibited in the plant for years because the men tended to spit on the floor and generally leave unsanitary conditions.

The Company does not presently provide a lunchroom facility and lunch and breaks are taken by the men in the plant area generally as well as outdoors on pretty days.

She testified no record of disciplinary action had been made against any employee for violation of the no smoking rule. She stated there had been a few verbal reprimands and reminders, but the Company recorded these to a personnel file only on a second offense in the course of progressive and corrective discipline.

In the course of negotiations the Company had proposed placing certain shop rules in the collective bargaining agreement. The Union protested doing so, although it apparently agreed that the content of the existing rules were the proper subject of work rules to be promulgated by management. When the management rights clause was negotiated the Company dropped its demand to include work rules in the contract in the face of the Union's acceptance of the management rights clause.

The Company evidence noted that cigarettes contain the warning that "the Surgeon General has determined that cigarette smoking is dangerous to your health." The Union noted that welding supplies contained the caution that welding, including brazing, may produce fumes and gases hazardous to health and to avoid inhalation of such fumes and gases.

According to smoking Union witnesses, they became nervous by being deprived of the use of tobacco and they also smoked heavier during break periods. According to the Company evidence,

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CONCLUSIONS OF LAW

1. The Respondent, W-I Forest Products Company, a limited partnership, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.
3. The total ban on smoking which Respondent imposed upon its employees at its Peshastin, Washington plant on January 1, 1989, does not breach the bargaining obligation of Section 8(d) of the Act as the ban does not constitute a mandatory subject of bargaining and therefore Respondent did not violate Section 8(a)(5) and (1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

ORDER

The complaint is dismissed in its entirety.

¹²If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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the relevant inquiry under the federal equivalent to PERA Section 701—Section 8(d) of the NLRA, 29 U.S.C. § 158(d):

Although parties are free to bargain about any legal subject, Congress has limited the mandate or duty to bargain to matters of "wages, hours, and other terms and conditions of employment." A unilateral change as to a subject within this category violates the statutory duty to bargain and is subject to the [NLRB's] remedial order. . . .

Nonetheless, in establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed.

Some management decisions, such as choice of advertising and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship. (Footnotes omitted.)

The pertinent and often repeated description by Mr. Justice Stewart of the line of demarcation contained in his concurring opinion in *Fibreboard Corp. v. National Labor Relations Board*, 379 U.S. at 222–225, 85 S.Ct. at 409–410, holding that the employer's decision to subcontract its maintenance work and the attendant decision to terminate a unit of unionized employees, ought first to have been submitted to bargaining; is as follows:

In common parlance, the conditions of a person's employment are most obviously the various physical dimensions of his working environment. What one's hours are to be, what amount of work is expected during those hours, what periods of relief are available, what safety practices are observed, would all seem conditions of one's employment.

This kind of subcontracting falls short of such larger entrepreneurial questions as

what shall be produced, how capital shall be invested in fixed assets, or what the basic scope of the enterprise shall be.

Employing these formulations, the National Labor Relations Board and the United States appellate courts have repeatedly held that matters pertaining to an employee's break time and the use thereof must be submitted to bargaining. See *Ford Motor Co. v. National Labor Relations Board*, *supra* (in plant food services and vending machine prices); *American Oil Co. v. National Labor Relations Board*, 602 F.2d 184 (8th Cir.1979) (revision of work schedule); *International Woodworkers of America, AFL-CIO v. National Labor Relations Board*, 127 U.S.App.D.C. 81, 380 F.2d 628 (1967) (work-week changes); *Larsen Supply Co., Inc.*, 251 NLRB No. 175, 105 LRRM 1177 (1980) (lunch hour changes); *Appalachian Power Co.*, 250 NLRB No. 38, 104 LRRM 1366 (1980) (discontinuance of washup period); *J.P. Steven's Co., Inc.*, 239 NLRB No. 95, 100 LRRM 1052 (1978) (reduction in break time given to consecutive shift workers); *Anchor Tank*, 239 NLRB No. 52, 99 LRRM 1622 (1978) (change in lunch break punch-out policy); *Chateau de Ville, Inc.*, 233 NLRB No. 161, 97 LRRM 1051 (1977) (revocation of permission to drink coffee previously extended to on-break waitress employees.) Indeed, the NLRB has held that the subject of a smoking ban must be submitted by the employer to bargaining. *Chemtronics, Inc.*, 236 NLRB No. 21, 98 LRRM 1559 (1978). See also *Albert's Inc.*, 213 NLRB 686, 87 LRRM 1682 (1974) (unilateral area restrictions on smoking).

[2] The subject of whether employees may smoke at their workplaces appears to us to be at the center of those subjects properly described as "conditions of employment" and to be entirely unrelated to those entrepreneurial or managerial judgments fundamental to the basic direction of the enterprise and removed from the scope of mandatory bargaining by PERA Section 702, 43 P.S. § 1101.702.¹

1. We recently held in *Chambersburg Area*

School District v. Pennsylvania Labor Relations

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have time after that, nor did she notify anyone in supervision that she did not have time to do the inspections. She admitted, under examination, she had a second job and still holds that job. She said she is committed to two jobs due to circumstances. She testified to receiving notice of the meeting to be held on 3/18/87, but "forgot" it. She also said she did not have time before the end of her shift to do the inspections asked by supervision.

Arguments:

The Union argues that due to a doctor's note dated 8/6/87 which stated that grievant was seen on 3/4/87 the absences of 3/3, 4 and 5/87 should be stricken. It also argues that grievant did inspect the hairpin at the outset of the day, and found they were one inch too short. She notified the employee to correct this error. Lastly the Union argues the grievant was not ordered to stay over in order to inspect the parts at or near the end of her shift; it also felt there was no substance in the scheduled meeting, and grievant could have been given the same information on a one on one basis.

The Company maintains the doctor's note dated about three months after the warning for absences, and tardiness contained absolutely no reasons for the visit to the doctor nor did it set forth any basis for absence from work for any day or days. It further states the warning for carelessness of work (1200 hairpins 1" too long) was the third written warning about carelessness and the inspection of these units once an hour was her responsibility which she ignored. It argued further, that if what grievant said about the other work was true, she failed in her obligation to notify supervision to have someone else inspect. Grievant also admitted that she had been asked by supervision to finish inspecting the parts before she left. It alleges there was sufficient time to inspect before the end of the shift, and she failed to do the requested work. Lack of attendance at the scheduled meeting was insubordination. The Company also says, given the prior disciplinary actions and the above events, it is clear the grievant was not fulfilling her obligations to the Company, and there was proper cause to terminate her employment.

Findings

It has been universally held by arbitrators that refusing work assignments constitutes insubordination. Such a refusal may be by direct words or by argumentative reluctance to perform the work.

In this case, it appears clear that the grievant knew a week in advance of the scheduled meeting and that it had a conflict with the working hours of her second job. She chose to ignore the instructions to attend this meeting, gave no excuse, and elected to go to her second job. Your arbitrator cannot give credence to her excuse that she "forgot". She was again reminded twice on the day of the meeting, once within 45 minutes of the meeting. It also appears her desire to leave for her second job caused her to refuse to do the request inspections near the end of her shift.

Your arbitrator finds no fault with maintaining two jobs so long as the second job does not interfere with the responsibilities of, and work performance of the primary employment. The absences and tardiness may also have resulted from this conflict of jobs as well as the carelessness of her work performance.

In any event, I find that the problems involved here did occur and were basically caused by grievant herself. The only mitigating circumstance is grievant's long employment and work history without a problem prior to the incidents involved here. I also find justification for discharge without progressive discipline (time off without pay) based on the agreement of the Company and Union to eliminate such procedure.

An employee who is habitually absent or late, is careless in his or her work, and is one who fails to perform work when asked is of little or no value to an employer. However, based on grievant's prior work history and long service, your arbitrator feels mitigation of punishment may be beneficial. Your arbitrator finds that the second job does interfere with grievant being able to do her work in a reasonable manner.

Grievant is to be reinstated without back pay, and with the loss of seniority for the period she was off the job, provided, however, she agrees and actually resigns from her second job. In the event she elects not to do so within two weeks from the receipt of this decision, then the employer has no further obligation and the action it took is sustained.

AWARD:

Grievance sustained in part upon condition being fulfilled.

LENNOX INDUSTRIES --

Decision of Arbitrator

In re LENNOX INDUSTRIES, INC. and INTERNATIONAL UNION UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, Local 893, Unit 11, FMCS Case No. 87/13801, December 4, 1987

Arbitrator: Robert L. Gibson, selected by parties through procedures of Federal Mediation and Conciliation Service

SMOKING

— Policy change — Condition of employment — 118.25 — 124.70

Employer was not required to bargain over smoking-policy changes that added restrooms and meeting rooms to designated non-smoking areas, despite claims that factory rules are part of contract and right to smoke is condition of employment, where smoking had been prohibited in certain hazardous areas for many years, rules in fact are not part of contract, and smoking still is permitted at work stations and in aisles and hallways.

CONTRACTS

— Rules and regulations — Incorporation in contract — 24.111

Factory rules and regulations are not part of contract even though rules are published in same booklet as contract and several contract provisions refer to rules, where union's failure to object to any previous unilateral rule changes indicates that parties did not consider rules and other information in booklet to be part of contract.

Appearances: For the employer — John F. Veldey, attorney. For the union — Max L. Tipton, international representative.

CONDITION OF EMPLOYMENT

1. Nature of Case/Proceedings

GIBSON, Arbitrator: — On December 1, 1986, the Company posted the following No Smoking Policy to be effective January 5, 1987:

"Lennox is responsible for providing a healthy and safe work environment for all of our employees.

"After careful review and consideration of all available information, Lennox has decided to take additional positive steps toward providing a smoke-free working environment.

"Starting Monday, January 5th, 1987, the existing smoking policy will be enforced. It

prohibits smoking in the areas of potential health or safety hazards. In addition to those current no smoking areas, the following areas will be designated as non-smoking:

1. The Aire-Flo Cafeteria;
2. All restrooms (factory and office as well as those in AEA VI);
3. Mail room;
4. Safety and First Aid;
5. Employee Relations;
6. Division lobby;
7. All meeting rooms including the Board Room, Factory Conference Room, Sales Conference Room and all Quality Assurance meeting rooms.

"All potential new hires and visitors will be informed of our no smoking areas.

"To help smokers adjust to the new policy, Lennox will be offering smoking cessation programs. The first program will begin in January. More information on all these programs will be provided.

"I believe the non-smoking policy will enhance the health and quality of work life for all our employees at Lennox. I also recognize, however, that for some smokers this will be a difficult period of transition. I hope non-smokers will be sensitive to these issues for smokers, because the success of this policy will depend on the cooperation of smokers and non-smokers alike.

"Any conflicts not resolved between employees should be brought to the attention of the appropriate supervisory personnel. In all cases the desire of a non-smoker to protect his or her health will take precedent over the employee's desire to smoke. As with all company policies, continued infractions may lead to disciplinary action up to and including termination.

"The no-smoking policy stresses cooperation on the part of all employees. Everyone has the responsibility to help carry out the spirit of the policy in a way that fosters good working relationships."

The Union protested this policy on December 23, 1986, when it filed this grievance:

"Nature of Grievance: No Smoking Policy
"Contract Article: Factory Rules and Regulation Section No. 2, paragraph 4

"Complaint: The privilege of smoking on the job was a right that was negotiated for, and is not subject to a policy change.

"If the Company wants a non-smoking plant, it must negotiate for that."

The Company denied this grievance. In its Third Step answer, the Company said:

"We held the third step meeting on this policy grievance. The Union's position was that this should have been negotiated under working conditions.

"The Company's position, with which I concur, is that smoking has never been a subject of negotiations and that it is not a negotiable item.

"Looking at the health consideration, smoking is becoming more a recognized health hazard for not only the smoker, but also for those affected by the passive smoke. The Surgeon General most recently has covered this in one of his statements.

"We have just taken minimal precautions in the No Smoking policy, and have designated only certain areas as No Smoking.

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stances of this case. While the Company's evidence indicates that one or two foremen had suggested complaints by non-smokers, this evidence is, at best, hearsay once removed, which is counterbalanced by the fact that many non-smokers have joined the instant grievance. The evidence indicates that under the conditions of the shop the employees work in an open area where smoke and fumes rise out of the work area rather quickly, rather than in confined small areas where smoke and fumes tend to accumulate. The evidence also demonstrates that the employees largely work at some distance from one another and that no perceptible difference in the amount of fumes and smoke in the atmosphere was detectable with or without the no smoking rule. Under these circumstances, the arbitrator cannot find that the no smoking rule in any way significantly protects non-smokers. The fact that smoking is permitted in the same areas during breaks and at lunch indicates that the rule was not primarily promulgated to protect non-smoking employees, since they are subjected to heavier amounts of smoke during these periods, when smoking employees will all light up.

Turning to the health consideration, the arbitrator accepts the evidence that there is a relationship between smoking and health, as previously noted, and that this relationship is so well known that he would have taken judicial notice of it absent the Company's evidence. Such a relationship is not, however, immediate but is, at best, cumulative over the use of cigarettes over an extended period.¹

In this regard, the arbitrator finds that the relationship between health and cigarette smoking is direct and proximate. As such, cigarette smoking undoubtedly also bears a direct and proximate relationship to absenteeism.

The fact that the relationship between cigarette smoking and health is direct and proximate does not necessarily make the rule invoked by the Company directly and proximately related to the Company's legitimate business interests, however, unless the rule can be said to directly and proximately benefit the smokers health so as to reduce absentee-

ism, and, for that matter, increase the longevity of good employees. In this regard, the arbitrator is compelled to the conclusion that the relationship between the rule and the health of the employees is, at best, remote. This is true because the employees are not thereby stopped from smoking. They will continue to smoke on non company time, as well as during breaks and lunch periods. There is no evidence that the enforcement of the rule would even significantly reduce the amount of cigarette or tobacco consumption, since there is a known propensity to utilize tobacco more heavily after periods when its use is deprived. One has only to observe smokers at the end of a church service to readily see this relationship.

The essence of the arbitrator's finding is that the evidence clearly discloses a direct relationship between smoking and health, but it fails to disclose a direct relationship between the no smoking rule and health, i.e. that the existence of the no smoking rule will have any bearing upon the employee's health. The rule will not change the smoker's habits, nor is there any evidence that it will even significantly reduce the habit so as to contribute to the smoking employee's health. At best, the relationship between the rule and the employee's health is remote, speculative, and conjectural.

To support a rule whose relationship to the Company business needs is remote, speculative, and conjectural is fraught with substantial danger to the personal freedoms of employees. For example, there are studies which show an increasing relationship between the use of coffee and other beverages containing caffeine and heart disease. Should a company, based upon the possible relationship to the health of its employees, be permitted to ban the use of coffee, Coca-Cola, and tea on its premises during break and lunch periods? By the same token, there is increasing evidence that certain food additives may constitute a health hazard over a sufficiently large statistical sampling. Should a company thereby, because of its interest in employees' health, be permitted to control what employees will carry in their lunch boxes and consume during lunch periods on company time? The arbitrator is inclined to think not. The relationship between those activities and the employee's health as an individual, is, at best, remote and indirect. The corresponding restriction upon the employee's personal freedom

¹ It is interesting to note that there are some studies that indicate that pipe and cigar smokers have a longer life expectancy than non-smokers, notwithstanding an increased incidence in lip and mouth cancer.

can hardly be justified by the Company's legitimate business interests.

Another consideration in evaluating the reasonableness of a rule is whether or not the rule is longstanding or newly promulgated. If an employee accepts employment and builds his economic security around a job, knowing that certain conditions exist which limit his personal freedom, the enforcement of a rule making such restrictions is much more reasonable, because the employee expected it from the beginning. On the other hand, a freedom which he had when he accepted the conditions of employment and built his economic expectations on the existence of a job should be more jealously guarded. A new rule imposing a new condition upon employment by restricting his personal freedom may be such that he would not have accepted the employment originally had he known of the rule, yet he is placed in the position of choosing between the new rule and the economic security toward which he has worked. The reasonableness of hair codes, for example, has often turned on whether the hair code was in existence when the employees accepted employment or is a new restriction upon their personal freedom newly promulgated. In the present case, there is a long tradition that employees were permitted to smoke on the job in areas where no immediate safety hazard was presented. This must be a significant consideration in determining the reasonableness of the instant ruling.

The arbitrator has searched the arbitration literature at some length for precedents in point with this case, where the reasons for a no smoking rule were not direct and immediate, with only limited success. The parties, in their briefs, have cited cases which are, at best, applicable by analogy and principle upon a company's rule making powers.

The most directly in point case found by the arbitrator was decided by Arbitrator Samuel H. Jaffee in 1971, Board of Education of Carroll County and Carroll County Teachers Association, 71-1 ARB, para. 8400, Issue No. 2, p. 4440. In that case the Board of Education unilaterally promulgated a policy banning smoking by teachers in all county schools. The School Board had previously afforded smoking facilities in teachers' lounges, providing ashtrays. The arbitrator ordered the no smoking policy rescinded because of that long standing practice.

The arbitrator would find that the reasons supporting a smoking ban in the Board of Education much stronger than those existing in this case, because there the policy would not only be supported by health considerations but also by considerations of example upon young minds. The consistency of the policy in such case to ban all smoking on the school premises was substantially greater than in the present case where smoking is permitted during the breaks and lunch periods.

Under all of the circumstances of this case, the arbitrator finds that the no smoking rule as promulgated by the Company in areas where an immediate safety hazard does not exist is unreasonable.

AWARD

For the reasons stated, the grievance is sustained. To the extent that the no smoking rule conflicts with this decision, the Company is directed to rescind it and to strike all records of disciplinary action based upon violation thereof.

HACIENDA HOTEL —

Decision of Arbitrator

In re HACIENDA HOTEL [Las Vegas, Nev.] and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 995, November 4, 1977

Arbitrator: Julius N. Draznin

DISCHARGE

—Misconduct — Parking attendant
▶ 118.646 ▶ 118.801

Hotel employer improperly discharged parking attendant for willful misconduct when he shouted at customer for parking his car in area that is not intended for customer self-parking, under contract provision stating that before discharging employee for reasons other than dishonesty or willful misconduct, employer will first give written warning of unsatisfactory conduct and allow employee a reasonable opportunity to correct any deficiency, since employee was not given opportunity to correct deficiency, and although yelling at customer in parking lot is serious, it is not so grievous that it merits discharge for first offense. Grievant is ordered reinstated without back pay or any other benefits on condition that should he commit any similar acts, he will

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negotiating the rule making power only for the purpose of promulgating a minimum number of rules and regulations which were essential to the orderly operation of the Company's business. This clearly advised the Union that retention of the rule making power was exclusively for the purpose of promulgating rules and regulations which were reasonable and necessary to the Company's business. The Union acceded to this power in the face of specific rules and regulations which the Company had which the Union deemed to be reasonable and necessary to the Company's business. Given this bargaining history, the Company must be regarded as having, in substance, told the Union that this power is for reasonable rules and regulations and for no other purpose.

4. The specific language of Article 1, Intent and Purpose, further fortify this interpretation. In that provision the parties have specifically covenanted that, among other purposes, the intent of their contract is "to promote harmonious relations between the Company, its employees, and the Union . . ." This clearly announces an intent and purpose that the rights secured to both parties are to be exercised reasonably to promote harmonious relations. If the Company intended to reserve a right to promulgate unreasonable rules and regulations, that would clearly run contrary to the intent and purpose as stated in Article 1 and would place those provisions in conflict. Granted a specific contract provision should prevail over a general one, all else being equal, but when the management rights clause is read in light of Article 1, this further fortifies the mutual understanding of the parties that the Company's rule making power should be reasonably exercised, which is not in conflict with the specific provision of the management rights clause.

5. Other portions of the management rights clause further fortify this meaning. For example, the management rights clause in which the rule making power is reserved also reserves to the Company the right to discipline and discharge "for cause." The term "cause," sometimes phrased as "proper cause" or "just cause," which have synonymous meanings, is a term of art when used in labor relations agreements. "Cause" is a well defined concept which has evolved in the field of labor relations and the use of that term invokes a whole series of prin-

ciples, including concepts of "industrial due process" (which is analogous to but not the same as due process of law to insure basic fairness). Under concepts of "cause" and employer will not be permitted to enforce by discipline an unreasonable work rule. Discipline may only be administered to enforce reasonable rules.

If the interpretation placed upon its rule making power advocated by the Company were adopted, i.e., that the Company could promulgate unreasonable work rules, an inherent inconsistency in the management rights clause, itself, would result, i.e., that the Company could promulgate a rule which would be totally unenforceable. This would mean that the parties had contracted for a purposeless rule making power. The parties must be intended to have drafted their language with a purpose and the only purpose of giving the Company a right to promulgate a rule would be to permit it to promulgate one which it could enforce. This purpose of being able to enforce a rule is clearly set forth and an inherent part of the Company's right to establish and modify rules. Since under concepts of "cause" it could enforce only a reasonable rule, the right to establish rules and regulations must be regarded as the right to establish reasonable rules and regulations.

Taking into account all of the foregoing factors, the arbitrator is compelled to find and does find that the employer's rule making power is subject to a limitation of reasonableness. The arbitrator will not burden this decision by citing the parties to innumerable decisions of other arbitrators who have made similar findings in interpreting contract language and which are readily available in the indexes and digests of the labor arbitration report services.

III.

Having determined that the Company's rule making power is subject to the limitation of reasonableness, if for no other reason than unreasonable rules could not be grounds for discipline under concepts of just cause incorporated into the same management rights clause, the issue must turn to whether or not the no smoking rule promulgated by the Company is reasonable.

The test of the reasonableness of work rules is whether or not the work rule is related to the legitimate business objec-

tives of the Company, i.e., the Company's production, sales, and profit. Certainly, in this regard, health and safety considerations are part of legitimate business objectives. By the same token, a Company will not be permitted to impose itself upon the personal lives and habits of employees absent a legitimate business objective. To a certain extent, the determination of the reasonableness of a rule or regulation involves the balancing of interest, with the Company's legitimate business requirements to be considered on one side of the scale and the employee's right to exercise personal freedoms free from unnecessary interference (except by government) on the other side of the scale. Because management has retained the rule making power, its determinations are entitled to a prima facie presumption of reasonableness. Once any evidence of unreasonableness is introduced, however, the prima facie presumption disappears and the evidence will weigh equally.

In weighing the evidence of reasonableness the relationship between the rule and the Company's legitimate business interests must be direct and proximate, as opposed to indirect and remote. Numerous factors may be taken into account, depending upon the particular circumstances of the case, including the history and past practices and the relationship between the parties.

Turning to a review of some of these criteria, no smoking rules have frequently been upheld as directly and proximately related to the employer's legitimate business needs under the following circumstances: Where smoking presents an immediate hazard to life, limb or property, as in oil refineries, coal mines, and other places where flammable or volatile substances occur; where smoking may contaminate the Company's product, as in the case of food packing industries and the manufacture of delicate instruments; where smoking may affect the Company's appearance to the public, as with sales personnel in food and clothing establishments, even though the members of the public themselves are permitted to smoke; and, where smoking demonstrably affects productivity, as in industries where both hands are constantly employed on delicate controls. The arbitrator will not burden this decision with numerous citations which have upheld no smoking rules under these conditions. In all of those cases, however, the

no smoking rule has been found reasonable upon a specific finding that there was a direct, immediate, and proximate relationship between the smoking and the Company's legitimate business interest in safety, productivity, quality control, or public appearance. In many such cases, the immediate need for the no smoking rule has been so directly demonstrable that violation of such a rule is regarded as an industrial felony which will justify discharge for a first offense. This has certainly been true in many cases arising in oil refineries and coal mines. In connection with an arbitration, this arbitrator was recently required to review the investigative findings in several coal mine disasters, and in one that involved substantial loss of life there was evidence of a charred match and smoking materials, clearly demonstrating the direct, immediate, and proximate relationship between the no smoking rule and the safety of that employee and of others.

In the present case the relationship between smoking and the Company's legitimate business interests are much less immediate. Lack of immediacy, itself, however, does not necessarily render the rule indirect and remote. The Company has made no contention, nor would the evidence support any finding, that smoking interferes demonstrably with productivity. There is nothing that would justify the arbitrator in finding that smoking employees are less productive than non-smokers. Since the Union has not challenged the no smoking rule as it applies to areas where an immediate safety hazard would be presented, safety, per se, as opposed to health, is not involved. Whether or not employees smoke in the shop could have little bearing upon the Company's public appearance insofar as affecting sales is concerned. Certainly smoking under the circumstances of this case in no way affects the quality of the Company's product.

Having removed these direct and proximate business considerations as not being involved, the question turns upon whether or not the no smoking rule has a direct and proximate effect upon the Company's interest in the health of its employees or upon the Company's duty to protect non-smoking employees from offensive conduct by smoking employees.

Turning to the latter consideration first, the evidence is not persuasive that smoking creates an offensive environment for non-smokers, under the circum-

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retains the right to make reasonable rules and regulations for the purpose of maintaining safety. In this dispute the Company has promulgated a rule which limits the area and the time during which smoking can take place. The Agreement also forbids smoking in prohibited areas. Formerly employees were permitted to smoke at their work stations while certain areas of the plant were designated as non-smoking areas. The Company now has limited smoking to only two areas of the plant, and further, that smoking is limited to scheduled break times. In order to determine if the Company has acted within the authority it has retained in the Agreement, a determination must be reached as to whether or not the rule is reasonable and if it was promulgated for valid safety reasons.

Although the employees have been permitted to smoke at their work stations prior to the issuance of the rule, several recent occurrences caused the Company to examine its smoking practice. First, the fire at the Lake City Industries plant became a concern to the Company. Among the possible reasons for the fire at Lake City was the belief that the fire was started by a discarded cigarette. It is recognized that a fire at another Company should have little impact on the long-standing practices at an unrelated company, however, the fire did cause Company officials to question their own safety practices related to smoking. A second, and a far more important occurrence, was the discovery of a fire at the plant itself. Fortunately, the fire was discovered in a timely manner and extinguished without further damage. The cause of the fire was surmised to be a discarded cigarette thrown on top of an oily glove. The final occurrence took place when a cleaning company employee mentioned his concern over the possibility of a fire from the machine oil and the discarded cigarette butts on the floor. When viewed as a whole, it must be determined that the Company had sufficient cause to examine the smoking practice at the plant.

Wilson investigated conditions in the plant and determined that smoking should be limited. He based his finding on the existence of the oil on the floor, the wrapping paper strewn about the floor, saw dust in the shipping area, wooden pallets used during production and general debris on the floor. The Union, on the other hand, maintains that the fire hazards listed by the Company are minimal at worst. It noted that the spot welder sprays hot sparks in the same area where smoking is banned. The question of if

the rule was imposed for safety reasons must be resolved in favor of the Company. It is the Company's obligation to provide a safe work environment. The Company has established the possibility of a fire being caused by a cigarette being discarded and igniting one of the cited sources. If that should occur, the safety of the employees would be at risk, along with their continued employment at a fire damaged plant. The banning of smoking at the work station is not unreasonable and, therefore, falls within the authority of the Company to issue such a rule.

The limiting of smoking to break times is also found to be reasonable. The Agreement reserves to the Company the right to manage its operations. Limiting the time that employees may be away from their work stations falls squarely within the retained right to manage the operation. The impact on production must be considered if the Union's position that employees should be permitted to leave their work stations whenever they desire to smoke is considered. The Company's rule of limiting smoking to break periods addresses such concern. As such, it must be found that limiting the times during which smoking may take place falls under the Company's right to manage and direct its operations.

The record reveals that there well may be a question as to the adequacy of the areas designated for smoking. The record establishes that the smoking areas become crowded during the break periods. It is also evident that designating the assembly room picnic table area as a smoking area may cause problems for those non-smoking employees using the area for eating lunch. The grievance does not specifically challenge that adequacy of the designated smoking areas, however, the Company would be well advised to examine this problem and to relieve the overcrowding and other related unsatisfactory conditions.

The Company's contention that banning smoking at the work station, and limiting the smoking to designated areas, will, in some manner, improve the health and well being of the employees is rejected as being offered without foundation. Smoking is still being carried on at the plant. The only change which has taken place relates to the time and place where the smoking is permitted. The company cannot cite concerns for the health of its employees as grounds for issuing the new smoking rule.

Based on the foregoing it is found that the Company did not violate the

Agreement when it issued the new smoking rules. The rule is found to be reasonable within the authority retained by the Company under the provisions of the Agreement. The Company has established valid safety concerns for promulgating the new rules. For all these reasons the remedy requested will not be granted.

AWARDED

The grievance is denied.

CLEVELAND ELECTRIC ILLUMINATING CO. —

Decision of Arbitrators

In re CLEVELAND ELECTRIC ILLUMINATING COMPANY and UTILITY WORKERS UNION OF AMERICA, LOCAL 270, AFL-CIO, AAA Case No. 53 300 0426 86, Grievance No. 272-AV-86, February 2, 1987

Arbitration Panel: Charles A. Morgan Jr., neutral chairman; Richard A. Peterka, company arbitrator; Hank Reffner, union arbitrator

DRUGS AND ALCOHOL

— Discharge — Excessive absenteeism • 118.6361 • 118.653

Discharge was too severe for employee with record of excessive tardiness and absenteeism resulting from use of intoxicants, where she performed adequately when present and received two promotions during last 1½ years on job, she had totally rejected all alcohol and drugs before being discharged, and she had sought help in her rehabilitation efforts, through employer and third parties, when she realized she could not totally abstain without support.

REMEDY

— Absenteeism — Drug and alcohol dependency — Modification of penalty • 118.03 • 118.806

Employee who was discharged for excessive absenteeism resulting from use of intoxicants is ordered reinstated to former or similar position within reasonable time, with any tardiness or unexcused absence during succeeding six months constituting grounds for discharge, and without back pay or accrual of any benefits during period of non-employment.

LAST-CHANCE REINSTATEMENT

Background

MORGAN, Arbitrator: — On August 11, 1986, the Grievant was terminated as a result of an incident of tardiness. Thereafter, a timely grievance was filed and, not having been resolved through the normal grievance resolution procedure concerning a discharge, the matter proceeded to arbitration.

Applicable Contract Provisions

ARTICLE III — Rights of Management Section 1.

The management of the Company, the direction and control of the property and operations, and the composition, assignment, direction and determination of the size of working forces belong to, reside in and shall be controlled by the Company, provided that these rights shall not be exercised for the purpose of unjust discrimination against any employee, or to avoid any of the provisions of this agreement.

The Company shall have the right to exercise full control and discipline in the interest of proper service and the conduct of its business, subject, however, to the employee's privilege of bringing a grievance as herein provided for in Article V.

ARTICLE VI — Seniority

Section 9.

All leaves of absence for periods of more than two (2) weeks except sick leaves and military leaves shall be requested and approved in writing and shall state the conditions thereof. A copy of each such leave of absence shall be kept on file by the department manager and a copy furnished to the employee and to the Union.

(c) While receiving sick leave benefits, an employee will accumulate seniority. After the expiration of such benefits, he will retain but not accumulate seniority for one year . . .

Section 10.

Seniority will be terminated in cases of resignation, discharge for cause, failure to reply within five (5) days to recall to work sent to the former employee's last known address by certified mail, return receipt requested, failure to report absence from work within three (3) days without reasonable excuse or justification, violation of the conditions of a leave of absence, or failure to report for work within one year of the expiration of sick leave benefits, and as provided in Section 9(c) of this Article. In any case where seniority has been terminated, it is understood that there is no further obligation to offer re-employment.

ARTICLE VIII — Full-Time Employment — Excused Absences With Pay

The Company agrees to make its practices uniform with respect to full-time employment and excused absences with pay and in connection therewith will pay all employees covered by this agreement on an hourly basis.

Section 3.

In addition to excused absences, with pay, for holidays, sick leave and vacations pro-

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rule prohibiting a reporter from taking gifts from the source for one of her stories relates to the core entrepreneurial concern of a newspaper. Under the judge's logic, unions would not be free to bargain over the removal of vending machines from employee lunchrooms or breakrooms if the machines sold foods that were high in fat or sodium or were otherwise condemned as unhealthy by the Surgeon General. Safety rules would be similarly removed from the bargaining table if the union were seeking freedoms from restrictions that the employer could characterize as a means of promoting employee safety.²

We also disagree with the judge's reasoning that the smoking ban falls outside the ambit of "terms and conditions of employment" defined by Section 8(d) because it has only an "indirect impingement on job security." The same could be said of the prices of food at an in-plant cafeteria. Yet the Supreme Court has held that "the availability of food during working hours and the conditions under which it is to be consumed are matters of deep concern to workers, and one need not strain to consider them to be among those 'conditions' of employment that should be subject to the mutual duty to bargain." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979). The Court said that the question is whether the subject matter is "germane to the working environment." In our view, a rule that forbids smoking is "germane to the working environment." Although smoking is not as critical to life-functioning as food in a cafeteria, and indeed may be deleterious to health, it is nonetheless a part of the working environment in which many smokers function. In addition, we note that in the instant case, a breach of the rule would constitute grounds for disciplinary action, including discharge and suspension. See *Johnson-Bateman Co.*, 295 NLRB 180, 183 fn. 18 (1989).

In sum, we find, as the Board implicitly did in *Alberts, Inc.*, supra, and *Chemtronics, Inc.*, supra, that a ban on smoking on an employer's premises during working hours is a mandatory subject of bargaining, regardless whether the bargaining representative seeks to obtain such a ban or to limit or eliminate it. In our view, the Board's failure in those cases to engage in an extended analysis of the basis for finding smoking bans to be mandatory subjects of bargaining had little or nothing to do with the fact that, because they were imposed for unlawful retaliatory reasons, they violated Section 8(a)(3) as well as Section 8(a)(5). Rather, we think the more likely explanation is that the parties and the Board thought it self-evident that restrictions on employee smoking in the workplace are "working conditions" within the meaning of Section 8(d).

²We emphasize that we are concerned here with activities that are not prohibited by any law. Nothing in this decision is meant to suggest that the bargaining obligation defined in Sects. 8(a)(5) and 8(d) of the Act would require employers to consider proposals under which violations of law would be immunized in the workplace.

B. The Total Ban Represented a Substantial and Material Change from Past Practice

Having found that workplace smoking bans are properly classified as mandatory subjects of bargaining, we next consider whether the changes in the Respondent's smoking restrictions were sufficiently different from existing rules as to have a significant, substantial, and material impact on the employees' terms and conditions of employment. The Board has long held that an employer is not obligated to bargain over changes so minimal that they lack such an impact. *Rust Craft Broadcasting*, 225 NLRB 327 (1976). Accord: *St. John's Hospital*, 281 NLRB 1163, 1168 (1986); *United Technologies Corp.*, 278 NLRB 306, 308 (1986); *Peerless Food Products*, 236 NLRB 161 (1978).

We do not agree with the judge that the change here lacked sufficient impact to make it subject to the bargaining obligation. The difference between being allowed to smoke only during breaks in designated areas (including breakrooms)—the pre-1989 rule—and not being allowed to smoke on the employer's property at any time clearly was a substantial and material change for those who smoked. As the judge recognized, although employees were free to go off the property during their breaks to smoke, this was not a simple matter. It meant walking from between 600 to 1500 feet from work stations out to an area next to a railroad siding beyond the Respondent's property line. Given the large accumulations of snow in the winter, this entailed, as the judge acknowledged, "quite a bit of discomfort." Failure to obey the rules, the judge found, subjected employees to disciplinary penalties including suspension or discharge. The judge found that after the rule was put into effect, several employees were given disciplinary warnings. In our view, the total ban amounted to a more substantial change than was proven in *St. John's Hospital*, supra, where the Board found that a prohibition on smoking during a 15-minute reporting period between shifts was not a bargainable change because that 15-minute period was the only time affected and such a prohibition had been enforced at times in the past. 281 NLRB at 1168.

C. The Change was not Covered by the "Closure of Issues" Clause

Having found that the smoking ban at issue here was of such a nature as to make it subject to the bargaining obligation imposed by Sections 8(a)(5) and 8(d) of the Act, we next consider the General Counsel's contention that the ban was subject to the second paragraph of the "Closure of Issues" clause, set out in section IX of the September 9, 1988 strike-settlement agreement. The consequence of such coverage, the General Counsel argues, is that the ban would be included among those issues that the parties had agreed

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VI. Company Position

1. The collective bargaining agreement between the parties has never contained any express grant of authority or prohibition concerning the right of employees to smoke on Company premises.

2. The information in the booklet which follows the collective bargaining agreement between the parties is not a part of the labor contract and merely represents a collection of information and policies concerning employment and procedures at the plant.

a. This material is included in the booklet as a convenient method of disseminating the information to bargaining unit employees.

b. This information and the policy set forth therein have been amended, added to or deleted from time to time without negotiations with the Union and without objections from the Union.

3. The Company is not required to negotiate any change in the smoking policy because it has the right to designate certain areas of the plant as No Smoking.

a. The privilege of smoking on Company premises is not a condition of employment which would require negotiations with the Union.

b. Instead, the nonsmoking policy is a reasonable rule regulating the conduct of employees during working hours to protect the health and sensitivities of nonsmoking employees.

c. The Union has not claimed that the Company's revised smoking policy was unreasonable or that they violated the prescribed procedure for implementing such a policy.

4. The Company has the right to conduct and operate its business, manage the plant and direct the working force.

5. The Arbitrator has authority only to interpret and apply the provisions of the collective bargaining agreement and he cannot add to, delete from or in any way modify or amend any of the provisions of the agreement.

6. The Union has the burden of proving that the Company violated the terms and conditions of the collective bargaining agreement by unilaterally implementing the smoking policy dated December 1, 1986.

a. There is no evidence in the record to substantiate the Union claim that the Company was required to negotiate with the Union any change in the Company's smoking policy.

7. A practice which is allowed to grow in the absence of a specific work rule is a present manner of doing things which the Company can change.

a. Such a practice is not evidence of an assent to a binding past practice which is a condition of employment.

b. If unrestricted smoking were a working condition, the Company could not have unilaterally imposed restrictions on smoking. Yet, it has done so in the past by limiting or prohibiting smoking in certain designated areas of the plant.

c. The Union witness candidly admitted that the information contained in the booklet and which followed the collective bargaining agreement, has been changed unilaterally by the Company without negotiation with the Union on many occasions.

d. The Union also acknowledged, through its testimony, that the restrooms are the only nonsmoking areas in the new policy which adversely affects the privilege of bargaining unit employees to smoke during working hours. All other areas designated as no smoking areas impacted on Management Personnel only rather than on bargaining unit employees.

VII. Analysis and Conclusions

The evidence falls far short of establishing that the Company violated the current collective bargaining agreement on December 1, 1986, when they unilaterally issued the above quoted No Smoking Policy.

There is no question but that the collective bargaining agreement refers to Factory Rules and Regulations in several different provisions. Also, there is no question but that the current Factory Rules and Regulations contain references to smoking. Nevertheless, these 2 facts in themselves do not establish that the Factory Rules and Regulations are a part of the collective bargaining agreement.

Although the Union says they did not object to previous changes in the Factory Rules and Regulations because those changes were reasonable, the Company has both added to, deleted and/or amended the Factory Rules and Regulations in so many instances in the past without prior negotiation with the Union that it is apparent that the parties did not consider the rules and regulations, together with the other information contained in the booklet following the signature page and Exhibits A — E inclusive as a part of the collective bargaining agreement.

The Union has argued that smoking must be a condition of employment because smoking has been permitted in the plant for many, many years. This is true only in part. Smoking also has been prohibited in certain areas within the plant for many, many years without objection.

Even though the Union has argued that these prior limitations were reasonable because smoking was prohibited only in hazardous areas of the plant, this Arbitrator is not persuaded that the right to smoke is a condition

of employment which must be negotiated. The very evidence presented by the Union itself undermines that position.

VIII. DECISION

Based on all of the foregoing, it is the decision of the Arbitrator that the Company did not violate the current collective bargaining agreement on December 1, 1986, when they unilaterally issued the above quoted No Smoking Policy.

WORTHINGTON FOODS —**Decision of Arbitrator**

In re WORTHINGTON FOODS, INC. and UNITED INDUSTRIAL WORKERS, SERVICE, TRANSPORTATION, PROFESSIONAL AND GOVERNMENT OF NORTH AMERICA, OF THE SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT, AFL-CIO, FMCS No. 87/14690, Grievance No. 8701, October 16, 1987.

Arbitrator: Bruce B. McIntosh, selected by parties through procedures of Federal Mediation and Conciliation Service

SMOKING**— Elimination of smoking •118.25 •124.70**

Food-manufacturer-employer that unilaterally eliminated smoking in workplace did not violate contract, where 15-year-old policy had restricted smoking to restrooms, lunchroom, and locker rooms pursuant to federal and state regulations prohibiting smoking near production lines, overwhelming and widespread documentation of probable adverse effects on non-smokers precludes finding rule to be unreasonable, and employer phased in smoking restriction over six-month period and offered to subsidize employees' participation in smoke-ending program.

Appearances: For the employer — Jonathan R. Vaughn, attorney. For the union — Francis X. Gorman, attorney.

ELIMINATION OF SMOKING**Statement of Facts**

McINTOSH, Arbitrator: — Worthington Foods, Inc., ("Company"), is engaged in the manufacture and distribution of meat-free food products. It maintains a manufacturing facility in Worthington, Ohio and a warehouse in Columbus, Ohio. Its Bargaining Unit is represented by the United Industrial Workers Union of North America ("Union").

In early January of 1987, the Company instituted a policy that gradually eliminated smoking within the work place by July 1, 1987. Prior to 1987, smoking had been restricted but was permitted in the restrooms, in the Company lunchroom and in certain locker rooms adjacent to the restroom facilities. Because the Company was a manufacturer of food stuffs, both Federal and State regulations prohibited smoking in the production lines and this restriction had been in effect for at least fifteen (15) years.

In addition to establishing the new rule, the Company provided the employees' pamphlets and information regarding the benefits of smoking cessation and also offered to subsidize the cost of each employee's participation in a smoke ending program.

Issue

Whether or not the Company violated the terms of the Collective Bargaining Agreement ("Agreement") by unilaterally instituting a rule that prevented smoking within the work place?

Pertinent Contractual Provisions

Article IV, Section 1 — Management Prerogatives — It is agreed that the common industrial relations concept referred to as the "Management Reserved Rights Doctrine" is hereby incorporated into this Agreement, and that the Company retains any and all rights not clearly and expressly limited by specific terms contained in this Agreement. In keeping with this understanding, it is intended by the parties that none of the Company's rights are to be limited by any future interpretation which is derived merely from some inference drawn from any portion of this Agreement, as opposed to a clearly intended, unambiguous provision reduced to writing by the parties and incorporated into this Agreement for that purpose. Among those rights reserved to the unilateral discretion of the Company, but not intended as a wholly inclusive list shall be:

The right to ... establish necessary reasonable rules; ... to determine the methods and manner of operation; ... and to make any and all decisions which in the sole opinion of management the efficient operation of the plant requires, provided that no such decision shall be exercised in direct violation of any specific and expressed limitation contained in this Agreement.

Article IV, Section 4 — Additional Management Responsibilities (a) The Company shall

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W-I Forest Products Company, a Limited Partnership and Lumber and Sawmill Workers Local 2841. Case 19-CA-20174

August 30, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On March 21, 1990, Administrative Law Judge James M. Kennedy issued the attached decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief. The Respondent, W-I Forest Products Company, a Limited Partnership, filed a brief in support of the administrative law judge's decision and a motion to dismiss the complaint.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, briefs, and motion, and has decided to affirm the judge's rulings, findings, and conclusions, as modified below, and to adopt the recommended Order.

I. INTRODUCTION

The complaint in this case alleged that the Respondent's implementation of a smoking ban at its lumber mill in Peshastin, Washington, violated Section 8(a)(5) and (1) of the Act because it was done without the consent of the Lumber and Sawmill Workers Local 2841 (the Union). The complaint alleged that such consent was necessary because the smoking ban was among those issues governed by a "Closure of Issues" clause in a strike-settlement agreement executed by the Respondent and the Union. Thus, the General Counsel predicated the violation of Section 8(a)(5) on his contention that the Respondent had violated the closure of issues clause by its action.

The administrative law judge dismissed the complaint on three independent grounds. He concluded (1) that a smoking ban is not a mandatory subject of bargaining insofar as a union seeks to eliminate or restrict the ban; (2) that even assuming such a ban is a mandatory subject generally, the Respondent was not obligated to bargain because the changes in smoking restrictions reflected in the ban at issue here did not represent a material and substantial change from existing restrictions; and (3) that even if a bargaining obligation existed, the Union had waived its bargaining rights. In finding waiver, the judge rejected the General Counsel's argument that the closure of issues clause in the strike-settlement agreement applied to the ban. He found that the strike-settlement agreement applied only matters which the parties had contemplated includ-

ing in their collective-bargaining agreement, and he concluded that the parties had historically dealt with plant work rules, such as the smoking ban, outside the framework of the collective-bargaining agreement. Therefore, assuming arguendo the ban was a mandatory subject, the judge regarded it as a noncontractual change on which the Respondent need only afford the Union notice and an opportunity to bargain. The judge concluded that the Union had received timely notice and had waived its right to bargain by its failure to request bargaining. The judge also found waiver on the basis of the Union's abandonment of a contractual grievance it had filed on the subject.

We reverse the judge's findings that smoking bans are not mandatory subjects and that this ban did not represent a substantial and material change, but we agree with the judge that the ban was not covered by the closure of issues clause and that the Union waived its right to bargain over it by its inaction in the face of timely advance notice by the Respondent. Accordingly, we adopt his dismissal of the complaint.¹

II. FACTUAL FINDINGS

As more fully outlined in the administrative law judge's decision, the issues in this case arose out of the facts that follow. In January 1987, the Respondent sought to implement a total ban on smoking on its property at Peshastin, Washington, and apparently at other mills as well. Prior to this time, smoking had been permitted during break periods in designated areas of the mill. That smoking rule was embodied in plant rule 3. The Respondent notified the Union by letter dated January 16, 1987, of its intention to implement the ban effective July 1, 1987, and its willingness to negotiate over the change. The Union responded to this letter by indicating that it would consider the unilateral implementation of this ban a violation of the collective-bargaining agreement in effect between the parties and a violation of the Act. On February 20, 1987, the Respondent answered the Union's letter by indicating that, if requested, it was willing to bargain

¹Subsequent to the administrative law judge's decision, the Respondent filed a motion to dismiss the complaint as moot, presenting the threshold question of whether we need to reach the merits. In support of its motion, the Respondent offers the facts that the Peshastin mill was closed on April 22, 1990, pursuant to an agreement between the Respondent and the Union on April 18, 1990, and that the production equipment and buildings were sold at a public auction on May 3, 1990. The Respondent argues that the present case should therefore be dismissed as moot because the Peshastin mill has been permanently closed and therefore any alleged unfair labor practice could not be continued and any resulting order could not be enforced.

It is a well-established principle that "mere discontinuance in business does not render moot issues of unfair labor practices alleged against a respondent. 'Irrespective of the ability of the respondent to comply with the order, a decree of enforcement is a vindication of the public policy of the statute.'" *Armillage Sand & Gravel*, 203 NLRB 162, 166 (1973). Where as here, the employer closes only one of several facilities represented by a union, there is no assurance that the alleged unlawful conduct could not be repeated. *NLRB v. Raytheon Co.*, 398 U.S. 25 (1970). For these reasons, the motion to dismiss the complaint as moot is denied.

over the ban and requesting clarification of which contractual provisions would be violated by the ban. The Union did not reply to this offer and request.

Because the contracts in all the mills were to be reopened for negotiations in 1988, the Respondent elected to delay the implementation of the smoking ban for union-represented employees and to announce the new policy simultaneously with the contract proposals. The ban went into effect as originally scheduled however, for managerial and nonunion employees. Negotiations for the new contracts at all the mills began in 1988 and took place at two levels, one for the "big table" issues (uniform issues to be implemented company-wide at all mills) and the other for "local" issues (issues specific to each individual mill).

The Peshastin contract was set to expire on August 3, 1988, and one local bargaining meeting was held at which, among other matters, the smoking ban was announced and discussed. The Union suggested alternatives to the total ban, but no resolution was reached and the Union never made any written proposals. Subsequent to this meeting, strikes at some facilities occurred including a strike at the Peshastin mill, and no further local meetings took place for Peshastin.

On September 9, 1988, a strike-settlement agreement (Memorandum of Agreement) was signed "Extending and Renewing Existing Agreements." Included in this agreement was a "Closure of Issues" clause which was understood by both the Respondent and the Union as designed to close any unresolved local bargaining issues for the term of the new agreement.

Following this agreement, on October 18, 1988, the Respondent posted announcements at locations throughout the mill of the new smoking policy to become effective on January 1, 1989. The notice was seen by the affected employees and there is evidence that the Union likewise was made aware of the announcement. The ban thereafter was incorporated into the plant rules and safety guides, infractions of which were grounds for disciplinary action including suspension and discharge.

On December 20, 1988, 2 months after the ban was announced, the Union filed a grievance through the three-step grievance procedure outlined in the collective-bargaining agreement. Under the terms of the agreement, this procedure does not lead to arbitration. The Respondent's plant manager denied the grievance, indicated that the ban was not a grievable issue, and designated violations of the rule as "gross misconduct" (i.e., behavior that, under the terms of the contract, could lead to discharge without notice). The ban took effect on January 1, 1989, as announced.

III. ANALYSIS

A. The Plantwide Smoking Ban was a Mandatory Subject

In concluding that the smoking ban was not a mandatory subject of bargaining, the judge noted at the outset, by reference to the reasoning of Justice Stewart's concurrence in *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 220-223 (1964), that not every management practice that affects employees is necessarily a mandatory subject of bargaining and that some are strictly matters of entrepreneurial concern as to which an employer has no duty to bargain. In particular the judge analogized a smoking ban to the rules on journalistic ethics at issue in *Capital Times*, 223 NLRB 651 (1976), and *Peerless Publications*, 283 NLRB 334 (1987), on remand from 636 F.2d 550 (D.C. Cir. 1980). The Board had found such rules to be strictly entrepreneurial concerns because they had little impact on employees' jobs and were aimed solely at protecting a core purpose—credibility and integrity—of the newspapers that promulgated them.

Applying the logic of the journalistic ethics cases, the judge held that a total plantwide ban on smoking is not a mandatory subject because smoking during the workday has only "an indirect impingement on job security," and because a rule banning smoking is consistent with "the nation's public policy on smoking," which disfavors smoking on grounds of health. In particular, the judge relied on that national policy to conclude that a total ban on workplace smoking would not be a mandatory subject of bargaining if the union seeking bargaining sought to resist it entirely or to restrict its coverage, but that it *would* be a mandatory subject if a union sought to obtain or extend such a ban.

The judge acknowledged the existence of Board precedents that treated restrictions on smoking as mandatory subjects on which a refusal to bargain would violate Section 8(a)(5). *Albert's, Inc.*, 213 NLRB 686, 692-693 (1974); *Chemtronics, Inc.*, 236 NLRB 178, 190 (1978). He discounted them, however, by noting that the employers in those cases had also been found to have acted out of union animus, in violation of Section 8(a)(3), and that there was no extensive analysis of the 8(a)(5) violations.

The analogy the judge attempts to draw between the ethics codes in *Capital Times* and *Peerless Publications*, and the smoking ban at issue here inaccurately assumes that protecting employee health and carrying out recommendations of various reports by the Surgeon General are core entrepreneurial purposes of a lumber mill. These may be laudable objectives for any employer, but they do not go to the heart of the Respondent's business in the way that, for example, a

"without design or deliberation." By the Utility's own admission it has, in its dealing with the NRC, endeavored to retain the radio in the control room rather than remove it. Indeed, the Employer made it quite clear that only after repeated attempts to secure its continued use in the control room fell upon deaf ears at the Commission, did it take unilateral action and order the radio's removal. The Utility's resistance to the NRC's "suggestions" was based in no small part upon its belief that the appliance was a help, not a hindrance to the Operators — that the background music enhanced the employees' attentiveness. Clearly, the Company has viewed its use as a benefit. It is equally clear from the evidence that the Union has also looked upon the radio as being a benefit. Testifying on behalf of the Operators, Chief Steward Robert Fisher (himself a Lead Plant Equipment and Reactor Operator) indicated that the employees affected by the Company's actions viewed the usage of the radio as an aid — one that prevented boredom and was valued by those people assigned to the Control Room (especially those on the afternoon and evening shifts when many of the facility's other employees were no longer present).

In their widely accepted treatise on arbitration, authors Elkouri and Elkouri, in *How Arbitration Works* (BNA 4th ed.) note that a distinction has evolved between those practices which are considered "binding" and those which are not, based largely upon whether the matter in issue involves "methods of operation or direction of the working force, or whether it involves a 'benefit' of peculiar personal value to the employees..." The authors then cite several examples of practices involving a "benefit" of peculiar personal value to the employees as opposed to the exercise of basic management functions by the Employer. Some of those referenced include such items as wash-up periods, coffee breaks, assistance in starting cars in cold weather, and the use of personal coffee pots and radios on company premises (the latter being a case cited by Local 160 in the instant dispute). It is further noted in the treatise that where a custom has been enforced and held to be binding upon the parties, the element of mutuality has been inferred, thus an "implied mutual agreement." In summary, the authors note that in the final analysis, "management in most cases is not really oppressed when it is required to continue customary benefits for the

remainder of the contract term." In the Arbitrator's view, the facts surrounding the instant dispute fit within this classification. The use of the radio in the control room at the Monticello plant must certainly be considered more of a benefit to the employees than any restriction of legitimate management functions regarding its methods of operation.

The Utility has further contended that its unilateral modification of the rules concerning the use of the radio over the years demonstrates that it has consistently retained discretion to control and limit the practice. It follows then, according to the Employer, that the element of mutuality is absent in this instance and that the decision to remove the radio falls within its managerial prerogative. There is however, a definitive line of decisions which hold that a given practice may be binding on management, but at the same time have reserved the right of the employer to regulate against abuse.⁴ The arbitral reasoning in these cases holds that while the practice is considered a benefit and therefore binding on the parties (at least for the duration of the existing agreement) it does not necessarily follow that it is immune from regulation or modification should conditions change from time to time. Clearly an abuse of the practice/benefit for example, would provide justification for corrective action by management. Thus, in the instant matter, the Company has limited the use of the radio where and when it has deemed it appropriate. While this right clearly exists, based upon the foregoing analysis, one cannot infer that the unilateral elimination of the practice altogether is thereby sanctioned.

AWARD

Accordingly, for the reasons set forth above, the grievance of Local 160 is sustained. The Company is therefore directed to return the radio forthwith to the Control Room at the Monticello Nuclear Plant.

⁴ Ibid, p. 445.

⁵ Metal Specialty Co., 39 LA 1285 (1962); Bethlehem Steel Corp., 50 LA 202 (1968) and Jervis B. Webb Co., 52 LA 1314 (1969).

⁶ At p. 440.

NATIONAL PEN & PENCIL CO. —

Decision of Arbitrator

In re NATIONAL PEN AND PENCIL COMPANY and UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1557, FMCS Case No. 86K/18799, October 25, 1986

Arbitrator: Samuel J. Nicholas Jr., selected by parties through procedures of Federal Mediation and Conciliation Service

WORKING CONDITIONS

— Smoking — Restroom use •118.25

Employer properly promulgated rule forbidding smoking in restrooms, where informal "monitoring agreement" designed to prevent "restroom abuse" had expired, rule was tied to legitimate business considerations, and union failed to show that rule was unreasonable, punitive, or precluded by contract.

— Work rule on smoking — Side agreement •24.111 •118.25 •124.01

Employer's right to restrict smoking in workplace is not affected by informal "agreement on monitoring going to the restroom," where agreement was never incorporated into collective bargaining contracts. It does not address smoking specifically, and current contract clearly reserves to employer right to establish reasonable work rules.

ARBITRATION

— Defenses — Estoppel •93.47 •94.173 •94.23

Union's failure to grieve work rule requiring permission to go to restroom and threatening prohibition against smoking in restrooms does not bar grievance protesting new rule limiting smoking to certain areas and forbidding it in restrooms.

Appearances: For the company — Charles H. White (Cornellus & Collins), attorney. For the union — George E. Barrett (Barrett, Davidson, Bryan, Ray & Ross), attorney.

NO-SMOKING RULE

I

NICHOLAS, Arbitrator: — The parties to this proceeding, National Pen & Pencil Company ("Company") and United Food and Commercial Workers Union ("Union"), are signatories to a two-year labor Agreement ("Agreement"), effective January 1, 1986. Under said Agreement, Union is duly recognized as the exclusive bargaining agent for Company's production employees at its Shelbyville, Tennessee plant, the facility from which the instant grievance arose. At the same time, Company has retained those rights of Management as are necessary and proper for directing the work force and managing the affairs of the business.

This matter comes on to arbitration via certain complaint ("grievance") filed by the Union as a class action and on behalf of all employees, alleging that the Agreement was violated by a unilateral change in Company's work rules. Union requested that the preliminary grievance procedure be preempted in order to proceed directly to arbitration.

II

The applicable provisions of the Agreement, as deemed relevant and pertinent to the issue(s) seen herein, are stated as follows:

"ARTICLE 1 — INTENT AND PURPOSE

The Employer and the Union each represents that the purpose and intent of this Agreement is to promote cooperation and harmony, to recognize mutual interest, to provide a channel through which information and problems may be transmitted from one to the other, and to set forth the agreement relative to rates of pay, hours of work and other conditions of employment for the employees covered hereby. The Employer and the Union recognize that the success of the employer is both vital to management and to its employees, and agree to work to the end that efficient economical and profitable operations are maintained at the Employer's plant covered by the Agreement. The parties to the Agreement will cooperatively to secure the advancement and achievements of these purposes.

"ARTICLE 10 — MANAGEMENT RIGHTS

The right to manage the business and direct the working force, including but not limited to the right to plan, administer, direct and control plant operations, hire and discipline for just cause, transfer or relieve employees from duty because of lack of work or for other legitimate reasons, the right to study or introduce new or improved production methods or facilities, and the right to establish and maintain reasonable work rules covering the operation and reasonable rules governing employee conduct, remain with the Employer, provided, however, that this right shall be exercised with due regard for the rights of the employees, and provided further that it will not be used for the purpose of discrimination against any employee.

"ARTICLE 18 — MEAL PERIOD

There shall be an unpaid meal period of thirty (30) minutes in the approximate middle of each shift.

"ARTICLE 19 — BREAKS

There will be a ten (10) minutes company paid break in the approximate middle of each half shift worked."

the longest period between a break is two and one-half hours.

Positions of the Parties

The positions of the parties may be summarized as follows.

Union:

1. The no smoking rule is not reasonably related to the legitimate business requirements of the employer.
2. The no smoking rule is, therefore, unreasonable and an improper effort by the employer to regulate the personal lives and habits of the employees.
3. The no smoking rule is discriminatory in that customers and others are permitted to smoke when bargaining unit employees are not.
4. The no smoking rule should be voided, as should any disciplinary action which might have been issued pursuant thereto.

Company:

1. The Company is not limited in its promulgation of rules and regulations to reasonableness under the management rights clause. It may promulgate any rule or regulation it desires, so long as the rule is not arbitrary or capricious.
2. In any event, the no smoking rule is not arbitrary, capricious, or unreasonable.
3. The rule is reasonably related to the Company's legitimate business considerations for both health and safety reasons, including the right of the Company to protect its employees against offensive conduct by others.
4. The rule is not discriminatory and applies equally to bargaining unit and non-bargaining unit employees alike.
5. The grievance should be denied.

Discussion

I.

At the outset it should be noted that the Company has cited and referred to certain statutory material in support of its position. It must be noted initially that the outcome of the present dispute is not in any way controlled by statutory regulation to which this arbitrator has been directed.

The Company has referred to three sources of public statutory regulation, as follows:

1. OSHA laws and rules and regulations promulgated pursuant thereto. To

the extent that OSHA regulations prohibit smoking in certain designated areas, the Union does not challenge the propriety of the Company's action in prohibiting smoking at all times. Smoking is unquestionably a source of ignition for combustible materials and would be so recognized even in the absence of a federal regulation telling us that it is. The right of management to absolutely prohibit smoking in areas where a danger of combustion or product contamination exists has never been questioned, whether the power to do so is asserted under a specific reservation of management rights or under the concept of the inherent rights of a common law employer. The instant grievance is directed to the Company's prohibition against smoking during working hours when no such dangers are presented. OSHA regulations have no bearing one way or the other upon the merits of the determination of that issue so presented.

2. The Company has alluded to a newly passed law of the 80th General Assembly of the State of Illinois, namely House Bill 168. Although this law has not yet been signed by the Governor and become effective, the arbitrator will treat the law as if it had been, since certainly a Company would not be unreasonable in anticipating compliance with a newly enacted law. That law prohibits smoking in a "designated area," which is defined by the law as:

"Any hospital patient room or patient area, elevator, indoor theater, library, art museum, concert hall, or a bus which is used by or open to the public."

That law has no application to the Company premises or to numerous other public areas, including industrial environs, commercial environs, sports arenas, and innumerable other areas frequented by members of the public generally.

3. The Company has also alluded to an ordinance of the City of Chicago, which, upon its face, has no application to the location of this plant.

The latter two references do demonstrate a growing public awareness to the fact that smoking is a health hazard to the smoker and may, in proper circumstances, be not only a source of annoyance but a source of health hazard to non-smokers confined in a smoke-filled environment also. To the extent that they support this contention by the Company they are considered. The Company's contention in this regard does not

stand in serious challenge as an issue of fact, and, as previously noted, the arbitrator believes these facts to be so well-known as to be emissive of judicial notice, even in the absence of the Company's proof. The contract and the attendant principles of the employment relationship, however, are exclusively controlling to the outcome of this grievance as they apply to the facts here presented. Public enactments to which the arbitrator has been cited are not the law of the case.

II.

Having determined that that contractual relationship is the source of the controlling principles to be applied to the facts of the case, the issue must turn to what is the contractual right of the Company to promulgate rules and regulations. In the present case, the Company has specifically reserved its right to promulgate, that is to "establish, modify, and enforce rules and regulations." It should be noted that even absent such a specific reservation this is one of the residual and inherent rights of management as a common law employer in the absence of a specific limitation upon that right.

The Company places great emphasis upon the fact that, as written, the rules and regulations it has a right to promulgate are not modified by the word "reasonable," as is found in some, but not all, collective bargaining agreements where there is a specific reservation of rights for management to promulgate rules and regulations. The Company argues from this that its rule making power is not subject to a limitation of reasonableness. The arbitrator cannot endorse this view for several reasons.

1. The Company admits that there is a tacit limitation upon the Company's rule making power that it not promulgate rules which are arbitrary, capricious, or discriminatory. In this same breath it makes this acknowledgment it contends it is not similarly limited by reasonableness, however. Phrasing the Company's position conversely, since it contends it need not make reasonable rules, the Company's contention squarely is that it may make unreasonable rules and regulations. There are, to be sure, certain subtle differences in the shade of meaning between that which is unreasonable and that which is arbitrary, capricious, or discriminatory. Those differences and

shades of meaning are much minimized when the words are used as adjectives to describe a rule as a secondary meaning rather than the primary description from which the root of the word was derived. The differences in meaning when applied to a rule are so subtle as to render the substantive difference *de minimis*. The words are frequently used as synonyms. The Company's admission that it cannot promulgate a rule which is arbitrary or capricious is very close to an admission that it cannot promulgate a rule which is unreasonable. Conversely stated, if a rule cannot be unreasonable, it must be reasonable.

2. When the parties enter into a collective bargaining agreement there is a tacit and implied understanding that they will act reasonably. In reviewing contract rights, generally, courts nearly always hold that contract rights were tacitly understood or impliedly understood to be exercised reasonably, unless the understanding and agreement is clearly to the contrary. The very nature of the collective bargaining agreement is such that there is an implied understanding that management will utilize its rights toward employees reasonably, and such a mutual intention is inherent in the relationship. One cannot imagine that management would bargain for a right to promulgate and enforce unreasonable rules and regulations and, even if this were imaginable, it is beyond belief that the Union would knowingly assent thereto.

Nothing in the present case indicates to the contrary. To be sure management gave up its desire to incorporate certain rules and regulations into the contract in consideration of a strong management rights clause. When it asked for the management rights clause, however, it did nothing to dispel the commonly understood assumption that it sought rule making powers of reasonable rules. It did not indicate to the Union that the commonly implied term reasonable was not intended by indicating it desired to promulgate unreasonable rules. The Union mutually agreed to that right in the face of this clearly implied condition.

3. The bargaining history of the provision clearly indicates that the rule of reason was not only implied but specifically discussed in negotiations. The uncontradicted evidence is that the Company, in securing the management rights clause, specifically told the Union it was

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Education Assn., supra at 639, citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). We will not, however, find such a waiver, and hence will find that the unilateral change violated Section 8(a)(5), when the change has essentially been made irrevocable prior to the notice or has otherwise been announced as a matter on which the employer will not bargain. *Michigan Ladder Co.*, 286 NLRB 21 (1987); *Owens-Corning Fiberglas*, 282 NLRB 609 fn. 1 (1987); *Kay Fries, Inc.*, 265 NLRB 1077 (1982).

The judge found that the Union was on notice of the Respondent's plan to implement the ban at least as early as August 25, 1988, when the plan was briefly discussed at a contract negotiating session. The judge found that the Union waived its bargaining rights based on two grounds. The Union waived its rights when it made only a "desultory effort" to request bargaining after the Respondent provided it with notice and opportunity to bargain. Secondly, the judge reasoned that the Union might have believed a bargaining request would be futile but that it waived its bargaining rights because its failure to follow through on a contractual grievance it filed over the ban amounted to a failure to test the Respondent's willingness to bargain on the subject. The General Counsel excepts, contending that the Respondent had made it clear to the Union that it would not bargain over the matter. We agree with the judge's conclusion that the Union waived its bargaining rights. We base this conclusion, however, on grounds somewhat different from those on which the judge relied.

As we have already found, in agreement with the judge, rules on smoking had never been included in the collective-bargaining agreement, so the Union might have deemed it futile to pursue contractual grievances on the subject.⁵ It was not, however, clearly futile for the Union to request bargaining. As noted in section II, above, the Respondent had first proposed extending its ban from the unorganized sectors of its work force to those represented by the Union in 1987, and on February 20 of that year, it had sent the Union a letter, signed by Hugh Bannister, the Respondent's labor relations spokesman, expressly declaring the Respondent's willingness to bargain on the subject. The Union never responded, and the original planned implementation date for the union-represented employees, July 1, 1987, passed without action because the Re-

⁵ Because we find, as explained below, that the Union waived its bargaining rights by failure to request bargaining after it was on notice of the planned implementation, we find it unnecessary to pass on the judge's conclusion that the Union waived its rights by its failure to exhaust the grievance procedure set forth in arts. V and VI of the collective-bargaining agreement. Arguably, art. VI simply means that if an unsettled dispute is not submitted to Federal Mediation and Conciliation Service, the parties will have waived their respective rights to strike or lockout.

spondent decided to delay implementation apparently because of the controversial nature of the change.

When the Respondent later announced the January 1989 date for implementing the ban by posting notices on October 18, 1988, the Union had no basis for believing that the Respondent had withdrawn its earlier invitation to bargain. Thus, although the Respondent consistently maintained that the ban was not part of the negotiations over subjects to be addressed in the collective-bargaining agreement (the "local issue" dispute), it never stated that it would refuse to bargain over the subject at all. Furthermore while the Union received notice of the Respondent's intent to implement a smoking ban 2-1/2 months prior to the implementation date and although it filed a grievance over the matter, it never requested bargaining over the ban.

In his exceptions, the General Counsel cites remarks made to Union Steward John Ellis by some of the Respondent's managers as indicating the futility of requesting bargaining. Those remarks, however, address mainly the origin of the policy ("came down from the higher ups") and the fact that these managers were not responsible for it and had no choice but to obey it. As noted previously, the rule was originally imposed on management as well as other segments of the unrepresented work force. The supervisor who spoke in the strongest terms about the futility of protest was Night Shift Foreman Jerry Pulse, but he was responding to Ellis' statement that he intended to file a grievance. Had the Respondent not offered in writing to bargain about this ban when it first announced it to the Union, perhaps the various remarks to Ellis would suffice to establish the futility of requesting bargaining. We simply find them insufficient, however, to overcome the Respondent's earlier express invitation to bargain.

Finally, we note that the Union's filing of a grievance over the smoking ban did not constitute a request for bargaining. *Haddon Craftsmen*, 297 NLRB 462 (1989) (filing, and then withdrawing, grievance not a request for bargaining). See also *Citizens National Bank of Willmar*, 245 NLRB 389, 390 (1979) (protesting a change and filing an unfair labor practice charge does not constitute a request for bargaining). In any event, the theory of the Union's grievance was that the smoking ban violated a written agreement between the Respondent and the Union. The Respondent's disagreement with the Union's contention that it was precluded by terms of the collective-bargaining agreement from implementing the ban is not at all inconsistent with its understanding that it was obligated to give the Union notice and an opportunity to bargain over it prior to any implementation. For the reasons stated, we find that the Union had such notice and opportunity and failed to act on it. We accordingly conclude that the Union waived its bargaining rights.

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arbitrator shall be limited to the construction and interpretation of this Agreement as applied to the subject of the grievance. The arbitrator shall have no power or authority to (1) add to, subtract from, or in any way modify the provisions of this Agreement, (2) limit or change any Company policy, practice or rule not stated in this Agreement, (3) interpret any such policy, practice or rule except as necessary in interpreting or applying this Agreement, (4) formulate or add any new policy or rule, (5) substitute his discretion or judgment for the Company's discretion or judgment in any case where the Company has sole discretion or judgment, (6) establish or change any wage or classification, or (7) hear any case arising out of negotiations for a new or amended collective bargaining Agreement.

ARTICLE XVII MISCELLANEOUS

G. RULES AND REGULATIONS. The members of the Union who work for the Company agree that all Company rules and regulations and absenteeism program now in effect, or as adopted or changed in the future, will be strictly observed and enforced at all times. It is understood and agreed that employees are subject to suspension from work for up to one (1) week without pay upon presentation and receipt of third warning slip issued upon violation and failure to comply with OSHA's general safety rules or Company rules, as posted.

APPENDIX "C" GENERAL COMPANY RULES

SECTION B. Any one of the following offenses will be ground for:

First Offense	- Any Offense Notice of Violation
Second Offense	- Any Offense A warning slip
Third Offense	- Any Offense Up to two weeks off
Fourth Offense	- Any Offense Dismissal

19. Smoking in posted areas.

Factual Background

The Morelite Equipment Company (hereafter "Company") produces "hazardous location UL listed fixtures" at its Girard, Pennsylvania plant. Approximately fifty full-time production and maintenance employees at the plant are represented for collective bargaining purposes by the International Brotherhood of Electrical Workers, Local Union No. 56 (hereafter "Union"). The current collective bargaining Agreement was entered into on September 17, 1984 and expires on September 17, 1987.

Until the events giving rise to the instant grievance, Company employees have been permitted to smoke in most areas of the plant with the exception of the paint room. Smoking was permitted at anytime and also was permitted at the employees' work station. On October 18, 1985 the Com-

pany's office personnel, who are not represented by the Union, were notified that smoking would no longer be permitted in the office and smoking areas. According to the Company, smoking was banned due to an increase in the number of office employees working within a relatively small, confined area.

Later that year, on December 22, 1985 a fire occurred at the Lake Industries plant not far from the Company's location. Unverified reports speculated that the cause of the fire was a carelessly discarded cigarette. Reports estimated that Property damage in the Lake City fire ranged near \$250,000. On January 9, 1986 a Morelite Company foreman discovered and put out a fire in a small trash can in the punch press department. He determined that the fire began when a cigarette was discarded into the can and fell upon an oily glove in the trash can. The fire did not cause any damage to the plant or equipment. On January 15, 1986 an employee of the cleaning service used by the Company approached the Company's owner and expressed his concern over the amount of machinery oil on the floors around the Company's machinery and the number of cigarette butts on the floor near the machines. He was worried that the combination of the two could result in a fire.

Dan Wilson, Production Manager was instructed to investigate the fire hazards related to employees smoking in the plant. Upon the completion of the study, he was then authorized to prepare a memo restricting all employees to smoking only in certain designated areas and only while on scheduled ten-minute breaks or during the lunch break. He had planned to present the memo at a meeting with the Union Committee on February 4, 1986 and to make the memo effective February 10, 1986. The meeting was postponed until February 12, 1986 and the effective date of the memo was moved to February 17, 1986. During the February 12, 1986 meeting the Union Committee requested that copies of the memo be given to all employees and that their input be sought. The Company agreed to permit time to obtain the employees' comments. The Union also filed the instant grievance on February 12, 1986.

Additional meetings were held between the parties on February 17 and 20, 1986. At the urging of the Union the Company agreed to designate a second location for a smoking area. The two designated smoking areas are the employee entrance area near the time clock and vending machines and

the picnic table area in the assembly department only during the first shift. Smoking is limited for all employees, including management, to the two designated areas. Smoking is permitted just before the start of the shift, during the lunch breaks and during the two 10 minute scheduled breaks. Union witnesses complained that limiting the smoking to the designated areas cuts down on the available time for smoking since the employee is not permitted to leave the work station until a signal is given. Complaints were also presented that the smoking areas are crowded and may cause discomfort for those non-smoking employees wishing to eat at the picnic tables in the assembly area.

The same Union witnesses question whether smoking at the work station really constituted a fire hazard. Employee Kenneth Klonowski, a confirmed smoker, observed that while smoking is banned, the spot welder is used in the same location and that it showers the area with hot sparks. He questioned if the machine oil really was a hazard since it was mainly confined to under the machines. It was further noted that much of the machine area is constructed of concrete and steel. The employees question if the amount of combustibles used in the plant would constitute a fire hazard. The Company pointed out that wood and paper used during production and shipping could catch on fire from a discarded cigarette. Wilson testified that he has not been pleased with amount of litter, paper and drinking cups, that has remained on the plant's floor and worries that the litter might be a source for fire. Wilson indicated that the plant is housed in a building that is estimated to be over one hundred years old.

The instant grievance was filed to protest the new limited smoking rule implemented by the Company and when the Parties were unable to resolve the matter it was appealed to arbitration hereunder.

Contentions of the Parties

UNION CONTENTIONS: The Union contends that the Company violated the Agreement when it issued the rule limiting smoking. Furthermore, it questions if the new regulation is reasonable in light of the long-standing practice at the plant. The Union observes that there is a lack of combustible material in the plant and that where a true fire hazard does exist, smoking is prohibited. It notes that the tool room consists of steel and concrete construction and is not likely to

burn. The Union complains that the areas set aside for smoking are crowded since smoking is limited to break times and lunch periods. It challenges as lacking proof, the Company's position that the oil drippings are flammable and combustible. The Union suggested as alternatives to the limiting of smoking as set forth in the rule, that the Company provide ash trays; limit smoking when wrapping paper is being used; or provide common smoking areas which can be visited at any time. It seeks a change in the work rule arguing that the rule clearly is unreasonable.

The union also contends that by establishing the new rule the Company has extended the area in which smoking is prohibited and the times during which smoking may take place. It classifies the change as substantial and unilateral. It submits that, while the Company may have the right to unilaterally change the designated smoking areas, it, in essence, has changed the employees' right to smoke. In addition, the Union stresses that an employee is now exposed to the possibility of being disciplined for smoking which was formerly an accepted practice. The Union concludes that the Company has failed to establish that the rule change is related to safety and, instead, it has expanded the possibility of discipline for employees. The Union requests that the smoking rule be rescinded.

COMPANY CONTENTIONS: The Company takes the position that it was acting within the terms of the Agreement when it established the new rules on smoking. It believes that the Agreement confers upon the Company the right to unilaterally make and enforce the smoking regulations and promulgated after discussion with the Union Committee. The Company submits that the rules are reasonable in light of the safety hazard and that it has provided alternative locations for smoking. It stresses that smoking at the work station is, indeed, a fire hazard. The Company points to the quantities of machine oil on the floor, paper, cardboard, wooden skids and glue near the work stations and determines that the possibility for a fire does exist. The Company further submits that health hazards exist for all employees from smoking and passive smoking. For all these reasons the Company seeks denial of the grievance.

Discussion and Findings

The Agreement empowers the Company to make and enforce personnel rules and regulations. It, furthermore,

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III

There does not exist serious dispute concerning the facts in this case. Quite simply, the case involves a change in Company work rules made by Management in view of a previous memorandum agreement covering the same subject matter.

On March 17, 1982 a memorandum agreement was struck between Union and Management regarding apparent abuse of restroom privileges by production employees. It appears that employees were leaving their work stations during working hours to go to the restroom to have a "cigarette break," where they used the facilities for conversing with fellow employees. Over time such behavior became a problem, considering the length and frequency of the breaks. Testimony indicates that said breaks primarily became "smoking breaks". Prior to the initial Agreement, Management sought to bring the abuse under control, and in an effort to improve the chance of success, it entered into the informal agreement with Union. The agreement was not later typed nor formally adopted, but merely initialed in pertinent places by the parties.

Considerable testimony was offered concerning the long-term success of this agreement; two contracts were effective and later expired without the Memorandum of Agreement having been formally made a part of the main Agreements by inclusion or addendum.

On August 12, 1985 a notice was posted concerning continual abuse of restroom breaks; it stated further abuse might necessitate termination of the privilege to smoke in the restrooms. The agreement already allowed for two Company paid breaks and a lunch break where employees were able to smoke.

On January 1, 1986, a new two-year labor contract was executed and adopted by the parties; the Memorandum of Agreement was not discussed nor included.

On April 23, 1986, a notice was posted to show that a change was being made in the work rules to disallow smoking in Company restrooms, effective May 1, 1986.

On April 29, 1986 the subject grievance was filed and it is properly before the Arbitrator for final resolution.

IV

The respective arguments of the parties are hereby noted:

UNION

1. By memorandum agreement of the parties March 17, 1982, a plan to

control restroom privilege abuse was formulated and never revoked; thus the agreement is still in effect and binding on the parties.

2. In changing work rules, which were subject to prior memorandum agreement, Company violated the purpose of collective bargaining as stated in Article I of the current contract.

3. Smoking in restrooms was historically allowed by the Company; as such it constituted a condition of employment which cannot be changed unilaterally by either party.

COMPANY

1. Company has express authority under Article 10 "to establish and maintain reasonable work rules covering the operation and reasonable rules governing employees' conduct..." Company was with the right to attempt to further correct the problem via the establishment of additional work rules.

2. Smoking during Company paid time is not an employment right, and this includes time in the restroom.

3. The informal agreement reached on March 17, 1982 was not made a part of the parties' two subsequent labor contracts, nor was it mentioned during negotiations. Therefore, it has no effect on the current contract.

4. Two breaks, in addition to a lunch break, are provided for employees. Accordingly, employees have no right to take additional breaks in the restroom for the purpose of smoking.

V

Notwithstanding the parties not reaching a stipulation on the issue that serves to frame this case, they understand that when reduced to its bare essentials, the dispute mandates that the Arbitrator address whether Company violated the collective bargaining Agreement when it chose to promulgate a new work rule that serves to limit an employee's right to smoke on plant premises. Specifically, can it be said that Company's unilaterally fashioned action, dated April 23, 1986, marks a departure from the mutually agreed upon agreement for "monitoring going to the restroom", dated March 17, 1982, and makes for a violation of the Agreement? Additionally, this case encompasses such jocular vein questions as: (1) Is an employee with the right to smoke while at work? (2) Did the referred to monitoring agreement create a certain condition of employment which Company cannot unilaterally discard?

Since Union has structured its case largely on the strength of the so-called

monitoring agreement, an examination and assessment of the subject agreement is in order. The agreement reads as follows:

Agreement On Monitoring Going To The Restroom

"When the Co can factually demonstrate abuse in a dept or depts the following will apply.

1. A letter will be given to each employee, supervisor included, stating that there is abuse in the dept and when it is corrected within 1 week the dept will be monitored.

2. During this short term monitoring period employees will notify in same manner that they are going to the restroom to the person persons designated by the Co.

Employees will not however have to leave their work station to make such notification. (saying I gone, waive to them point out is notification)

3. Monitoring periods will not exceed 2 weeks.

4. In some monitoring situations it will not be necessary to notify supervisor that the employee is going to the restroom although someone (fellow worker closest to the exit) will be notified."

The parties do not dispute that Management was encountering problems with employees on the use of plant restrooms in early 1982. While smoking may have been a concern to both parties, it is interesting to note that the aforementioned agreement did not specifically address smoking, nor does it directly pertain to same. In the main, the agreement evidences the parties' regard for time spent in the restroom, i.e., over and above what can be said to be reasonable and proper. In short, the parties devised the subject agreement for allowing given procedure to be implemented in connection with making certain that employees did not engage in what has come to be known as "restroom abuse." Why Management chose to gain Union's support by a written agreement is not a subject before this Arbitrator. Presumably, on the strength of its rights clause (Article X or whatever in effect at the time), it could have chosen to proceed unilaterally in keeping with its recognized rule making authority.

Union claims that the agreement reached on March 17, 1982 is still operative; that Company cannot take any action relative to restroom privileges without Union's concurrence. On the other hand, Company would now show that the agreement reached with Union for monitoring the "going to the restroom" does not preclude Management from exercising its right under Article 10 for fashioning any and all rules to make certain that minimum standards of conduct are seen. Moreover, it holds that whatever weight the "monitoring agreement" carried in 1982 ceased with the expiration of the

collective bargaining agreement in force and effect during that time.

With due consideration given to the parties' positions, your Arbitrator finds it unnecessary to determine whether the March 17, 1982 agreement is effective today, for he is of the firm opinion that this understanding was not designed to control smoking, be it occurring in the plant restrooms or other locations on Company's premises. But since the parties have in large measure tied their positions to the monitoring agreement, I am compelled to pass on the merits of this action and its present application.

The agreement reached by the parties in early 1982 must be understood to represent an understanding whereby an accommodation was reached relative to one's right of privacy for engaging in certain necessary biological functions together with Management's right to have employees at their given work stations and actively engaged in production. It is to be noted that the current collective bargaining agreement does not contain a so-called "zipper clause." However, the parties understand that any labor-management agreement, as duly sought and bargained for, shall contain all elements and subjects of conditions of employment; that it must serve to control all of the parties' rights and duties due one another. And if a labor-management contract is to embrace words and phrases other than those written therein, proper identification must be given to the specific memorandum, addendum, side agreement, etc. in order to show that such action does not conflict with their mutually bargained for agreement. Here, Union has failed to show that the so-called monitoring agreement, dated some 4½ years ago, was extended, i.e., carried over, and incorporated into the successive labor-management agreements. At best, Union Ex. #1 represents a mutual understanding reached by the parties to allow Management to limit the time an employee may spend in Company's restrooms — and during the 1982 contract term. To hold that the aforementioned understanding controls here is to say that the agreement has been incorporated into both the 1982 & current collective bargaining Agreements and, at the same time, it serves to limit the rights duly retained by Management in Article 10 supra. In that regard, it is undisputed that Union recognizes Company's sole right to not only "manage the business and direct the working force..." but "... the right to establish and maintain reasonable work rules covering the operation and reasonable rule governing employee

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"We feel that the action the Company has taken is for the overall good of our employees, and for that reason, I deny the grievance."

II. The Issues

The essence of the grievance, as presented, is that the Company violated "the current labor agreement (Factory Rules and Regulations) when a nonsmoking policy was unilaterally implemented by the Company." The Union argued that, with the exception of certain hazardous areas within the plant, smoking policies were a condition of employment and should be bargained by the parties, not unilaterally imposed. The Company denied these assertions.

The issue to be decided, therefore, is: "Did the Company violate the current collective bargaining agreement on December 1, 1986, when they unilaterally issued the above quoted No Smoking Policy?"

III. Cited Contract Provisions

1. Table of Contents,
- a. Factory Rules and Regulations (p. 4).
2. Article 3, Rights and Obligations of Parties,
 - a. Section 1 A (p. 8).
 - b. Section 1 C (p. 9).
 - c. Section 1 D (p. 9).
3. Article 4, Adjustment of Grievances,
- a. Section 3, Step 4 (p. 12).
4. Article 11, Absenteeism,
- a. Section 4 (p. 31).
5. Article 26, Pension Plan (p. 54).
6. Article 37, Apprentice Training (p. 60).
7. Article 40, Duration of Agreement (p. 60).
- And
- Factory Rules and Regulations
1. Index (p. 71).
2. Rule 10, Smoking in Prohibited Areas (p. 74).
3. Section 2, General Information (p. 77).

IV. Facts

The Company produces heating and air conditioning equipment at its Marshalltown facility where it employs approximately 545 bargaining unit employees.

The Union has been the certified bargaining agent for the Company's production workers at Marshalltown since 1977.

Smoking has been prohibited in certain hazardous areas of the plant for many years.

The limitation on smoking has been published in a booklet which includes the collective bargaining agreement between the parties. The labor contract is printed in the first 60 pages of the booklet, followed by a signature sheet which includes representatives of both the Company and the Union.

Immediately following the signature page is Exhibit A which includes the base hourly rates for the period of the contract; Exhibit B which is a tabulation of job classifications by rate ranges; Exhibit C which is a list of the various job classifications; Exhibit D which is a list of the promotable jobs; Exhibit E which is a grievance form; and the last, Exhibit F, (Layoff Assignment form) is found on page 70 of the booklet.

The "Factory Rules and Regulations" follow Exhibit F. Any violation of Rule 10, "Smoking in prohibited areas," carries a warning for the first offense up to discharge for the fourth offense.

Thereafter, in Section 2 of the Factory Rules and Regulations there is this statement about smoking:

"With the exception of certain hazardous areas employees are allowed to smoke in the plant while at work. Please be alert to the hazard areas and cooperate in this policy, otherwise smoking privileges may be withdrawn."

Testimony presented at the hearing indicates that the Union had never challenged the Company on the list of hazardous areas in which smoking was prohibited.

The Company stated that, while they are required to negotiate with the Union on conditions of employment, the issue of smoking has never been discussed in negotiations and is not a condition of employment. On the other hand, the Union suggested that, since smoking had been permitted in most areas throughout the plant for many years, smoking had become a condition of employment and, therefore, any change should be negotiated.

In support of this position, the Chairman of the Shop Committee testified that the various contract provisions cited above refer in several instances to the Factory Rules and Regulations, adding that, in his opinion, everything printed in the booklet was a part of the collective bargaining agreement.

The witness also testified that no disciplinary action had been imposed by the Company for violation of the new nonsmoking policy; however, one employee had been stopped from smoking small cigars at his work station, a privilege he had enjoyed prior to that time.

In the opinion of the Shop Chairman, the nonsmoking policy is not reasonable because nonsmokers are given preference over smokers. On cross examination, the witness acknowledged that with the exception of the employee who was prohibited from smoking the small cigar, employees can smoke at their work station, in the

aisles and the hallways except for hazardous areas and certain offices and meeting rooms. The latter prohibition impacts only on nonbargaining unit personnel.

The Shop Chairman also acknowledged that the Company has from time to time changed language in the Factory Rules and Regulations without negotiating with the Union and that some of the rules were changed or deleted and others added. According to the witness, the Union did not grieve those changes because they felt they were reasonable.

The Company Employee Relations Manager testified that there had not been any "smoking" policy as such prior to December 1, 1987, although smoking had been prohibited in certain designated "no smoking" areas.

The Employee Relations Manager also testified that the new nonsmoking policy was a part of the Company's increasing concern over health related problems. He pointed out that they have established a "Wellness" program, weight counselling, conditioning and no smoking clinics and the like. He pointed out that the primary nonsmoking area is the restrooms and that there is no ban on smoking elsewhere except in certain designated areas unless, for some reason as in the case with the small cigar, the smoke became offensive.

The Employee Relations Manager testified that, in his opinion, the Factory Rules and Regulations starting at page 77 of the booklet (and the following information) is not a part of their collective bargaining agreement with the Union; that the items included or incorporated between pages 77 and 99 are not negotiable items. The witness pointed out that the Company has changed this material or added information, as well as deleted items, on those pages without negotiation over the years. He cited the Safety Work Program, Factory Safety Program, and the Safety Rules segments as well as Section 7 of the Factory Rules and Regulations entitled, "What to Do in Case of Injury," as examples of items which were added or changed.

According to this witness, the rules and regulations and the general information contained on those pages was included within the same booklet as the collective bargaining agreement as a convenient way to distribute that information to all employees.

The Employee Relations Manager testified that the nonsmoking policy was not intended to completely eliminate smoking from the facility because it would be unreasonable to do so. He added, however, that the policy could

change if the circumstances warranted.

The Factory Manager confirmed the testimony of the Employee Relations Manager, adding that while they had considered a total ban of smoking at the work stations, it was decided that it would not be appropriate at this time because the work area is open and well ventilated.

The Factory Manager also confirmed that the Company has never negotiated with the Union on the matters set forth in the booklet entitled, "Factory Rules and Regulations." He testified that the Company has changed both the information, policies and procedures many times over the years, all without negotiating the same with the Union.

The Shop Chairman testified on recall that the Union had never challenged any of the changes made by the Company in Factory Rules and Regulations because those changes were deemed to be reasonable.

V. Union Position

1. Article 3, Section 1 C states that the Company will have the right to "effect reasonable factory rules and regulations not in conflict with this Agreement."

2. Other provisions of the collective bargaining agreement, as well as the Factory Rules and Regulations, are a part of and incorporated in the collective bargaining agreement by reference.

a. The index to the collective bargaining agreement refers to Factory Rules and Regulations.

b. Article 3, Section 1 D also refers to Factory Rules and Regulations.

c. Article 11, Section 4 refers to Factory Rules and Regulations.

d. Article 26 relates to the Pension Plan which is part and parcel of the collective bargaining agreement, although set forth in a separate booklet.

e. Article 37 on Apprentice Training is a separate agreement, although it is a part and parcel of a collective bargaining agreement.

f. Article 40 states that the collective bargaining agreement shall not be subject to reopening except as provided in Article 39 for any other purpose prior to June 9, 1989.

3. Smoking is a condition of employment and the parties should negotiate on this issue.

a. The unilateral adoption of a nonsmoking policy by the Company is a violation of the current labor agreement.

b. The nonsmoking policy is not reasonable and Management is adding to and changing the collective bargaining agreement by unilaterally publishing the same without bargaining with the Union.

that the Board has had smoking issues come up before, and has even found unlawful unilateral changes. See the cases cited by the General Counsel, *Albert's, Inc.*, 213 NLRB 686 (1974), and *Chemtronics, Inc.*, 236 NLRB 178 (1978). Yet those cases are facially distinguishable. Both were in the context of reprisals for union activity and neither analyzes whether smoking is a bargainable subject as defined by Section 8(d). It was simply assumed to be the case. Moreover, they fall within a group of cases where the analysis is affected by union animus. I do not suggest that union animus is a factor to be considered in unilateral change cases, but only observe that where it is present, less consideration is often given to the bargaining duty analysis because it is unnecessary to the outcome, particularly where clear mandatory subjects are included in the change.

Possible anomalies aside, I conclude that a union seeking a more healthy work environment acts consistently with the Wagner Act when it asks an employer to eliminate the hazards of tobacco smoke. It is acting for the good of the whole, not the personal needs of some. Therefore, I do not find it disharmonious to hold that a union's demand to eliminate, or partially eliminate, smoking is a mandatory topic which an employer must meet, while an employer need not meet with the union if it has eliminated or intends to eliminate the hazard altogether. Likewise, if an employer only intends to partially eliminate smoking, and the union wishes to bargain over that, either for the purpose of extending the ban or for arranging the manner of controlling smoking, it must do so, for partial bans under my analysis must be bargained. Indeed, if I had been asked, I would have found that an employer who imposes a total ban, after having allowed smoking, would be obligated to bargain over the effects of the change. This would allow bargaining for such things as an adequate transition period or even to ask an employer to pay for cease-smoking programs. That would still leave the ban itself within the employer's exclusive domain.

Even if one were to find a smoking ban unilaterally imposed by an employer to be a mandatory subject of bargaining, I would be forced to conclude, on this record, that there is really no significant impact on Respondent's employees' working conditions. First of all, bargaining unit employees had never been allowed to smoke while performing their regular work tasks. Smoking had been permitted only on breaks and in locations away from the production area. Thus there was already a near-total ban in place. On January 1, 1989, the ban was simply extended to eliminate the smoking havens. Employees still receive the same number of breaks and are privileged to go to the same breakrooms as before for the same length of time. Now, however, a nonsmoker may enter a breakroom where smoking had previously been permitted but without having to encounter secondhand smoke. The fact that smokers must now make a difficult trek in a short period of time to find a nonmill location to smoke is a matter of their own choice. They are the ones who have chosen to become addicted to tobacco and who have chosen to take the health risks associated with it. Theirs is a personal condition which they have imposed upon themselves; not a condition which the employer has set. Thus Respondent is simply telling its employees that if they choose to take this health risk, it is their own responsibility, but they must do it at a location where the Employer cannot be seen as having encouraged it in any way. The impact of this ban, although perhaps subjec-

tively important to the smoker who has been denied the privilege, is, objectively speaking, not much. It has no significant impact on their working conditions, nor is smoking necessary to a successful break. Accordingly, I would dismiss this case on that ground as well. See *St. John's General Hospital*, 281 NLRB 1163, 1168 (1986) (smoking ban during shift change did not have significant impact).

Continuing to assume that an employer's unilateral smoking ban is a mandatory subject of bargaining, I would find that Respondent, beginning at least with its meeting of August 25, 1988, advised the Union of its intention to impose the ban. The Union counterproposed at least two locations where smoking might be allowed but no agreement was reached. The Union could have continued to seek to bargain over the subject but did not, probably in the view that it would have been futile. Yet, the Union did not test the Company's resolve, although articles V and VI of the new collective-bargaining contract do provide the procedure for resolution.¹¹ Indeed, article V, section D states that if the grievance is not referred to the Federal Mediation and Conciliation Service within 30 days, it "shall be conclusively waived." There is no evidence in this record that the matter was ever submitted to the FMCS as contemplated by article VI. Accordingly, it is not unreasonable to conclude that the grievance has indeed been waived "conclusively" by the contract. Compare *E. I. du Pont & Co.*, 294 NLRB 493 (1989) (taking away smoking and other privileges in locker room not an unlawful unilateral change as union waived claim by not pursuing grievance). Finally, although not argued by the parties it seems likely that the management's-rights clause is broad enough to constitute the Union's waiver of the right to bargain over the ban. See *Laredo Packing Co.*, 254 NLRB 1, 8, 9 (1981). I hesitate to make that finding, however, as none of the parties have raised or briefed the issue.

Thus on two grounds, if not three, it would appear that the Union chose to waive the right to bargain. The first occurred when the employer gave it notice and the opportunity to bargain but it made only a desultory effort to do so. *Citizens National Bank of Willmar*, 245 NLRB 389, 390 (1979). The second occurred when it tried to grieve the matter but abandoned it at the pre-FMCS stage.

I conclude that the complaint should be dismissed. I reach this conclusion based on my finding that the topic is a nonmandatory subject of bargaining and that Respondent had no obligation to bargain over its imposition of a total ban on smoking at its Peshastin mill. Alternatively, I find that even if the ban is a mandatory subject of bargaining, it had no significant impact upon the employees' working conditions. As a second alternative, I find that Respondent gave the Union an opportunity to bargain over the subject. When the Union declined to pursue the matter it waived, either by passivity or by its abandonment of the grievance procedure, any objections it may have had to this change. Accordingly, I make the following

¹¹ Art. V of the new contract is the grievance procedure. It does not, however, lead to arbitration. Art. VI is a limited no-strike clause which requires the parties first to seek the assistance of the Federal Mediation and Conciliation Service to resolve grievances. If they are unable to reach a satisfactory resolution of the grievance, that clause provides certain procedures leading to a strike.

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to leave unresolved. Therefore, it is argued, the status quo could not be changed as to this matter during the agreed-upon renewal term of the collective-bargaining agreement. Having made such an agreement, the Respondent would violate Section 8(a)(5) by imposing the ban, regardless whether it offered the Union an opportunity to bargain about it. For the following reasons, we reject the General Counsel's exceptions on this point and affirm the judge's finding that the smoking ban was not subject to the "Closure of Issues" clause.

The strike-settlement agreement, which applied to all the Respondent's unionized plants, including the Peshastin facility, began with a preamble stating that the parties "agree to the following amendments and revisions of each individual W-I Forest Products Company, L.P., collective bargaining agreement in full settlement of all subjects of collective bargaining." There followed various articles identified by roman numerals, setting forth changes in contract language. Section VIII provided as to local issues on which the parties had agreed and "signed off" that the language reflecting those changes would be "incorporated into [the collective bargaining] agreements." The closure of issues clause (sec. IX) read, in its entirety, as follows:

IX. CLOSURE OF ISSUES

A. All issues upon which authority to negotiate was delegated by local Unions and district councils to the IWA and WCIW or their designated representatives, not covered herein, are withdrawn and closed for the term of the bargaining agreements as modified.

B. Other issues opened either by local Unions, district councils or the Company not included in this settlement are withdrawn for the term of the bargaining agreements if unresolved because not signed or initialled as of the time this Settlement Agreement is signed and ratified.

The General Counsel argues that the subject of the smoking ban was an issue opened by the local unions, that it was left unresolved as of the time the strike-settlement agreement was signed, and that by virtue of the parties' agreement that such issues would be regarded as "withdrawn for the term of the bargaining agreements." Accordingly, it is argued, the Respondent was obligated to leave existing smoking restrictions unmodified and could not even require the Union to bargain over any changes during that term. The Respondent does not dispute the General Counsel's theory of the operative effect of that clause. It simply disputes that the smoking ban is covered by it.

We agree with the judge that section IX,B, read together with the preamble to the strike-settlement agreement, establishes that the issues which the parties agreed to regard as "closed" were solely those issues

that were negotiated within the framework of bargaining for a collective-bargaining agreement—issues on which language would have been added to or modified in the contract had agreement been reached.

The smoking ban was essentially a modification of an existing plant rule that restricted smoking to certain areas, and it is undisputed that the plant rules had never been part of the collective-bargaining agreement. Although two union representatives testified that the smoking ban had been discussed at the August 25 bargaining session and that the union representatives had expressed some views on it there, their testimony does not contradict the testimony of the Respondent's witnesses that the Union did not expressly propose at that meeting changing the parties' traditional framework for dealing with plant rules. Thus, while the Union presented written proposals on various issues discussed at that meeting, it never put anything into writing on the subject of smoking.³

In short, the smoking ban was not one of the subjects that the parties had agreed in section IX,B of the strike settlement agreement would be "withdrawn for the term of the bargaining agreements if unresolved" The Respondent was thus free to impose it during the term of the contract, so long as it first gave the Union notice and a reasonable opportunity to bargain.⁴

D. The Union Waived its Rights by Failing to Request Bargaining After Notice that the Respondent Planned to Implement the Ban

When an employer announces plans for a change in noncontractual working conditions, a union having sufficient notice of the contemplated change will ordinarily be deemed to have waived its bargaining rights if it fails to request bargaining prior to implementation. Further it is incumbent on the union to act with due diligence in requesting bargaining. *Kansas Education Assn.*, 275 NLRB 638, 639 (1985), and cases there cited. Although a union may waive this right, such a waiver must be "clear and unmistakable." *Kansas*

³ We agree with the General Counsel's contention that the Respondent could not lawfully insist on keeping plant rules out of the collective-bargaining agreement if the Union wished to include them. We do not agree, however, that the question of whether there should be contract language on the subject of smoking restrictions was sufficiently crystallized prior to the execution of the strike-settlement agreement to permit a finding that the Respondent was insisting to impose on keeping plant smoking rules out of the collective-bargaining agreement. In any event, that was not the theory of the complaint.

⁴ The General Counsel has also argued in his exceptions that smoking restrictions should have been held in status quo during the term of the renewed bargaining agreement because art. 24 of that agreement (a waiver of bargaining, or "zipper" clause) required this. We decline to consider this contention because art. 24 was neither alleged nor litigated as material to the issues here. Hence, as the Respondent correctly observes, it had no notice or opportunity to offer any evidence concerning the significance of that provision. *Casneways Hotel*, 284 NLRB 612, 613-614 (1987), and cases there cited. Compare *Jones Dairy Farm v. NLRB*, 909 F.2d 1021, 1028-1029 (7th Cir. 1990) (no due process violation where respondent had itself relied on a particular contract clause and claimed surprise when the Board construed it as supporting the case against the respondent).

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I recognize the differing opinions expressed by outside experts as to how the break in the line may have occurred, but that is not relevant to this case. Had the Company been trying to prove mischief in the matter of the break in the hose, that would have been another thing, but this wasn't asserted, though there was some unnecessary inference as to when and how it occurred. The evidence is conclusive that the brakes operated adequately after the break in the line was found, and that is the most critical aspect to be considered.

From a careful analysis of the facts presented, I find that it was a preventable accident which should never have occurred.

The evidence as to the dollar amount of damage resulting from the accident (\$3004.34) was uncontroverted. The next question then is whether this should be considered to be a major accident as the term is used in the collective bargaining agreement. We do not have the benefit of documentary evidence used during the bargaining sessions which would reveal the intent of the parties. However, we do have the letter from the Company's attorney (A. J. Harper, II) to the Union, dated November 24, 1982, which provides meaningful substantiation of what was intended. Although this letter is not a formal written agreement, and the amount is not a rigid fixed figure, it is significant to note that the Union did not raise objections to the "guidelines" when the letter was received — nor when the figure was quoted in a later arbitration case (1984). Accordingly, it must be accepted as a clear indication that \$3000.00 was a general ballpark figure to serve the parties as to when there has been a major accident. Even after making allowance for subsequent inflation, the damage in the present case is such that I believe a reasonable person would view it as a major accident.

Under the provisions of section 16.01, the Company has retained the right to discharge an employee in this kind of situation without prior warning. However, for the record it should be noted that management had been counseling the Grievant about his productivity and the quality of his work during the weeks or months before this accident. And there had been a disciplinary suspension the month before for a different offense. It cannot be successfully argued that the Grievant was not fully aware of the complaints made about his lack of attention to his duties.

It is a sincere hope that the Grievant will be able soon to overcome his per-

sonal problems. However, as the Company pointed out in its brief, leniency is not within the province of the Arbitrator when, as in this case, the Company has complied with the contract, and there is no finding that the decision was arbitrary, capricious or unreasonable.

AWARD

For the reasons given above, it is held that the discharge of the Grievant was for just cause and the grievance is hereby denied.

MORELITE EQUIPMENT CO. —

Decision of Arbitrator

In re MORELITE EQUIPMENT COMPANY and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 56, FMCS Case No. 86K/12644, January 28, 1987

Arbitrator: Carl F. Stoltzenberg, selected by parties through procedures of Federal Mediation and Conciliation Service

WORKING CONDITIONS

— No-smoking rule — Reasonable-ness — Safety — 124.70

Rule limiting smoking for all employees, including management, to designated times and areas — employee entrance area near time clock and vending machines, and picnic table area in assembly department during first shift only; before start of shift, during lunch, and during two 10-minute breaks — is reasonable, under employer's obligation to provide safe work environment and its right to manage and direct operations. Evidence established possibility of fire being caused at work station by discarded cigarette.

— No-smoking rule — Reasonable-ness — Employee health — 124.70

Contention that banning of smoking at work stations and restricting it to designated areas will improve employees' health and well-being is rejected as support for reasonableness of rule, where it is offered without foundation and smoking still occurs at plant.

Appearances: For the company — J. D. Cullen, attorney; D. H. Wilson, production manager; H. Senyo, plant manager; T. P. Raffensberger, assistant plant manager. For the union — V. White, attorney; K. Klonowski, H. Bayletts, D. L. Brown, L. McDonald, E. McMillen, and B. B. Gradler, witnesses.

NO-SMOKING RULE

Grievance and Question to be Resolved

STOLTZENBERG, Arbitrator: — On February 12, 1986 the following grievance was filed:

Violation Article I — Article IV Section C and Appendix "C" — dealing with the posting of entire shop as a no smoking area also Article II.

Settlement requested: Fair and equitable posting of areas for no smoking agreed to by both parties. (sic: Daniel H. Wilson)

The question to be resolved is whether or not the new rule on smoking is reasonable and fair.

Cited Portions of the Agreement

The following portions of the Agreement were cited:

ARTICLE I INTENT AND PURPOSE

It is the intent and purpose of the parties to set forth herein all of the agreements of the parties pertaining to all matters which were negotiated with respect to wages, hours of work and other terms and conditions of employment for employees covered by this Agreement. It is the general purpose of this Agreement to promote the mutual interests of the Company and its employees. To promote harmonious relationships, the parties hereto desire to establish rational, systematic methods for the settling of disputes by prompt and peaceful means. The parties to this Agreement will cooperate fully to secure the advancement and achievement of these purposes.

ARTICLE IV RIGHTS OF EMPLOYER TO MANAGE

A. GENERAL. The Company has complete legal responsibility, except as expressly and specifically limited in this Agreement, and sole right and power to manage and operate the Company, including but not limited to the right to hire, assign, transfer, promote, demote, schedule, layoff, recall, discipline, and discharge its employees and direct them in their work; the right to make and enforce personnel rules and regulations; the right to determine and schedule work assignments and hours; the right to determine the acquisition, installation, operation, maintenance, alteration, retirement, and removal of equipment and facilities; the right to transfer or subcontract work; the right to control all property, equipment, and facilities under its care, custody and control, and the manner and extent of their use; and the right to cease doing business in whole or in part. Notwithstanding the foregoing, the Company will not subcontract out work when it will result in the layoff, or the failure to recall from layoff, any permanent employee qualified and classified to do the work.

B. RESIDUAL RIGHTS. The Company reserves to itself all of the rights of management, except as specifically limited by the terms and conditions of this Agreement.

C. RULES AND REGULATIONS. During the term of this Agreement, the Company shall have the right to require compliance with its existing rules and regulations and the right to make such reasonable rules and regulations it may from time to time deem best for the purposes of maintaining safety, order and/or effective operation of its facilities, and after advanced notice thereof, require compliance by the employees unless such a rule or regulation is in conflict with a specific section in this Agreement.

ARTICLE VII ARBITRATION

E. LIMITATION ON AUTHORITY OF ARBITRATOR. The power and authority of the

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even though birth might occur after the employee has been laid off and no longer an employee of the Company. If the argument of the Union was adopted, then a person pregnant for two months could secure employment with the Company and be covered seven months later on birth of a child. Such would clearly be contrary to the requirement of six months employment with the Company prior to coverage. The rule of six months was designed to insure that the Company did not pay medical and surgical benefits for an event occurring before the insured became employed by the Company, however, to adopt the argument of the Union would permit this very thing.

In the absence of evidence to the contrary, it is presumed that customary underwriting practices apply to the instant case. One such underwriting practice is that maternity coverage relates to date of conception. This insures that the Company or its insurance carrier will not be paying for a pre-existing condition, that is, a pregnancy predating employment. Such practice is normally spelled out with a provision limiting maternity coverage to employees with ten months or more service with the Company on the date of delivery. There is no evidence in the instant case that anything else was intended under the coverage afforded by the labor agreement.

If, therefore, maternity benefits depend on the date of conception instead of the date of delivery, the Grievant was covered under the 1973 insurance program for pregnancy. There is nothing to indicate that the increased 1976 insurance benefits would apply to coverage already established under the 1973 insurance program. In fact, the language of the labor agreement that "(i) improved benefits will be made effective only for periods of disability or claims commencing on or after the date of execution" of the labor agreement, specifically negatives any such intention. Indiana General Corporation, 62 LA 45.

For the reasons stated, it is the

DECISION AND AWARD

of the undersigned that the issue is answered that maternity benefits are payable under the plan in force at the time of conception. The grievance is denied.

SCHIEN BODY & EQUIPMENT CO., INC. —

Decision of Arbitrator

In re SCHIEN BODY & EQUIPMENT CO., INC. and UNITED STEELWORKERS OF AMERICA, LOCAL 8557, FMCS Case No. 77K/17279, Grievance No. 77-1, November 16, 1977

Arbitrator: Raymond R. Roberts, selected by parties through procedures of Federal Mediation & Conciliation Service

PLANT RULES

—'No-smoking rule' — Reasonableness ▶ 118.25 ▶ 118.6567

Employer did not have right to establish rule that prohibits employees from smoking in fabricating and other work areas during working hours but allows them to smoke in some areas during breaks and lunch period, since (1) absence of immediate safety hazard in areas covered by rule makes "no-smoking rule" unreasonable, it appearing that shop is in open area where smoke and fumes rise out of area quickly and employees largely work at some distance from one another, (2) employer does not contend that smoking interferes demonstrably with productivity or that smokers are less productive than non-smokers, (3) there is no evidence that enforcement of rule will significantly reduce cigarette or tobacco consumption, in view of known propensity for smokers to utilize tobacco more heavily after periods of deprivation, and (4) there is past practice under which employees are permitted to smoke in areas where there is no immediate safety hazard.

Appearances: For the company — Fred N. Reichman, attorney. For the union — George J. Knecht, international representative.

NO-SMOKING RULE

Grievance

ROBERTS, Arbitrator: — By the grievance filed in this case, the Union has protested:

"The 'No Smoking Rule' is unjustified and unfair to employees and is not covered by stated OSHA rules."

The settlement requested is that the No Smoking Rule be cancelled and any disciplinary action pursuant thereto be rendered a nullity.

Contract Provisions

Among other provisions contained in the collective bargaining agreement between the parties is Article IV, Management Rights, which provides, in part:

"Except as expressly limited by a specific provision of this Agreement, the Company retains and shall continue to have the sole and exclusive right to manage its business and direct the working forces, including but not limited to the right to . . . establish, modify and enforce rules and regulations. . . . The rights of management described above and all other inherent rights of management not expressly limited by a specific provision of this Agreement are vested exclusively in the Company and are not subject to the arbitration procedure of this Agreement except as so limited."

Article XXII, Safety and Sanitary Conditions, provides, in part:

"Section 1: The Company shall furnish and maintain reasonably safe and healthful sanitary conditions including washing facilities, toilets and drinking fountains."

"Section 2: Employees will be required to use safety devices or clothing provided by the Company in accordance with instructions or Company rules."

"Section 3: The Company and the Union shall each designate one individual to serve on a joint Company-Union safety committee. These individuals, or such persons as may be designated by the respective parties to act in their stead, shall have access to and review all copies of accident reports prepared by the Company and shall make periodic inspection tours of the plant at times mutually agreeable to them but no more frequently than once every two months said tour to be immediately followed by a joint safety committee meeting."

The Company is engaged in the business of fabricating, installing, and repairing specialized truck bodies and equipment and farm equipment and specialty items. It also sells and installs on truck and farm equipment manufactured by other manufacturers. Some 80 to 90 employees are in the bargaining unit. This is a first contract between the parties dated October 25, 1976. Apparently the certification of the bargaining unit, subsequent strike, and difficulties in the parties reaching the bargaining table have left some residual feelings.

The Company has apparently always observed a no smoking rule in the Company offices out of the bargaining unit area and in foremen's offices in the bargaining unit area, in which non-bargaining unit employees are prohibited from smoking. Some applicants have declined employment for this reason. If visiting

salesmen to the Company offices request to smoke employees are under instructions to request they not do so. This same request is not, however, directed to customers.

In the plant area, itself, which is located in several buildings, smoking has always been prohibited in certain areas besides foremen's offices, including appropriate areas in the paint shop and paint storage areas where a fire hazard is readily apparent. Included in the area where smoking has traditionally been prohibited is the storehouse or warehouse area. Following its understanding of OSHA rules, the Company has posted some additional areas with a prohibition against smoking, including areas where acetylene and oxygen bottles are stored and a slab room where wooden materials are stored. The remainder of the plant, including fabrication areas, had not been subject to a prohibition against smoking prior to March 24, 1977, except in the immediate areas around oxygen and acetylene bottles used for cutting torches and non-electric welding. Until March 24, 1977, employees were permitted to smoke in these areas at all times.

On March 24, 1977, the Company unilaterally promulgated a no smoking rule applicable to its employees throughout the plant while "on-the-clock." This rule provided:

"In OSHA's standards to minimize fire hazards, they are requiring 'No-Smoking' signs to be hung in the following areas that will effect our place of business:

- 1 - Spray painting operations.
- 2 - Areas in which flammable or combustible material, boxes or parts are stored or sold.
- 3 - Areas around petroleum products.
- 4 - Areas where oxygen or acetylene is stored or used.
- 5 - Battery charging areas.
- 6 - Wood working areas.
- 7 - Warehouses.

"This will cover practically all of our plant. We now have several areas where smoking is not allowed, such as our parts department, the warehouse, paint department and none of the offices in the plant, sales or the bookkeeping department. We will now add the 'No Smoking' signs in the areas they designate. This will require more employees not to smoke when they work. So, for greater safety, cleaner air, and longer life, we will have a company rule starting April 1, 1977:

NO SMOKING EXCEPT BEFORE AND AFTER WORK, ON BREAK OR LUNCH HOURS, AND THEN YOU WILL HAVE TO SMOKE IN DESIGNATED AREAS.

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ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and dismisses the complaint in its entirety.

Max D. Hochanadel, Esq., for the General Counsel.
Louis B. Livingston and Randy Steadman (Miller, Nash, Wiener, Hager, and Carlsen), of Portland, Oregon, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried before me in Wenatchee, Washington, on October 17, 1989, upon a complaint issued by the Regional Director for Region 19 of the National Labor Relations Board on July 28, 1989. The complaint is based upon a charge filed by Lumber and Sawmill Workers Local 2841 (the Union) on February 3, 1989. It alleges that W-I Forest Products Company, a Limited Partnership (Respondent or W-I) has committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act.

Issues

The issue in this case is whether Respondent was privileged on January 1, 1989, to implement a no-smoking ban at its Peshastin, Washington mill. The General Counsel asserts that the rule was implemented in violation of a "closure of issues" clause found in a recently signed strike settlement agreement. Respondent asserts the closures of issues clause has no application to plant rules, but was directed instead at issues intended for insertion in the successor collective-bargaining agreement; it also argues the Union in several different ways waived its right to bargain over the issue.

I. JURISDICTION

Respondent admits it is a Washington limited partnership with an office and place of business in Lake Oswego, Oregon, doing business at various locations in Idaho, Montana, and Washington, including Peshastin where it is engaged in lumber production. It further admits that it meets both the Board's direct inflow and direct outflow interstate commerce standards and that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits that the Union is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Background

As noted, Respondent operates a lumber mill at Peshastin, Washington. Its Peshastin production and maintenance employees are represented by the Union.¹ Respondent's oper-

¹ The bargaining unit which the Union represents has been admitted and is described as follows:

ations, however, are not limited to the mill at Peshastin. It also operates similar mills in Coeur D'Alene and Colburn, Idaho, and Thompson Falls, Montana. Until late 1988, it operated a mill in Cashmere, Washington, quite close to Peshastin. All these mills (including Cashmere until its closing) are or were unionized operations. The two Idaho mills are represented by a local of the International Woodworkers of America, AFL-CIO, and the other three are represented by locals of the Lumber and Sawmill Workers, affiliated with the Lumber Production & Industrial Workers, through its Western Council.

Respondent shares certain managerial personnel with another lumber production firm, DAW Forest Products Company. Like Respondent, DAW operates mills in Montana, Idaho, and Oregon. As a result of their common interests, both unions and both employers have agreed to bargain in common fashion, although each of the facilities is covered by a separate collective-bargaining contract with the appropriate local union. These contracts do not have common expiration dates, although they usually expire during the same year.

In 1988 all these contracts were opened for renegotiation. The Peshastin facility had the latest expiration date, August 31, 1988. As that date approached, because the contracts at the other facilities had already expired, bargaining between the employers and the unions groups was already ongoing, taking place at two levels: the so-called "central" or "big" table issues and the "local" table issues, limited to a given plant. All of these issues were destined to be embodied in the actual collective-bargaining agreement (or if they were table issues which had not survived bargaining, were to be excluded from the collective-bargaining contracts). There was, however, a third type of concern which may or may not have involved a bargaining obligation as defined by Section 8(d) of the Act, but which the parties normally did not consider part of the contractual process. Nonetheless, the parties agree that the topics covered are often mandatory bargaining subjects and they do negotiate resolutions of them. These are the plant and safety rules which may vary from plant to plant. They usually deal with safety or employee behavior matters. For example, at Peshastin Respondent has issued a document known as the "Safe Practice Guide." It is a rather extensive booklet detailing the plant rules. It sets forth directives on such things as proper protective clothing, attendance, bringing or using intoxicants/drugs, horseplay, and the like. It also included, prior to January 1, 1989, plant rule 3, which proscribed smoking except in approved areas.

B. The No-Smoking Rule at Peshastin

As noted above, prior to January 1, 1989, smoking had been prohibited at the Peshastin plant except in designated areas. Testimony suggests that there were at least two such areas. The January 1, 1989 ban, however, was to eliminate them and to prohibit smoking by anyone anywhere on the site or in any company vehicle off the site. The ban had actually begun in 1987 when a directive was issued to all unrepresented employees, including supervision and higher management, which prohibited them from smoking anywhere

All production and maintenance employees at Respondent's plant at Peshastin, Washington, exclusive of office and clerical help, retail salesmen, superintendents, or professional or supervisory employees and watchmen or plant guards, as defined by the Labor Management Relations Act of 1947, as amended.

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in the plant. According to their chief negotiator, Hugh Bannister, the two employers actually had intended to impose the ban in 1987, but ultimately decided that since they would be bargaining with the Unions at the various plants in 1988, they would wait to put the smoking ban to the Unions simultaneously with the proposals for new collective-bargaining contracts.

Bannister testified that the reason Respondent and DAW decided to impose this ban at their plants was to avoid certain state workmen's compensation decisions which had held employers liable for tobacco-induced illness in circumstances where employers had allowed smoking on the premises. In addition, according to Bannister, W-I and DAW were troubled because they did not wish to be in a position where they could be accused of promoting the idea of smoking or continuing to promote smoking. Moreover, he says, it was the companies' understanding that smoking was creating serious problems with emphysema and lung cancer which had a direct affect on the cost of health and welfare, and, although those costs would be indirect to the companies due to their membership in various health trusts, it was nonetheless a consideration.²

In any event, beginning in January 1987, Bannister began an effort to implement the smoking ban at Peshastin and probably other locations as well. On January 16, 1987, he wrote the Charging Party's agent, Hank Pieti,³ a letter proposing to implement a no-smoking policy for a "safe and healthy work place," noting that it had already been implemented with respect to nonbargaining unit employees. He offered to meet and negotiate with Pieti or his representative on the matter. He stated in the absence of the Union's willingness to negotiate on that topic, the policy would go into effect on July 1, 1987.

In response to Bannister's letter, James S. Bledsoe, executive secretary of the Western Council, wrote Bannister asking Respondent to rescind its decision since all of the collective-bargaining agreements were closed until various months in 1988. He said the Union would view unilateral implementation of the policy as being a violation of the Act as well as the contract. On February 20, 1987, Bannister replied to Bledsoe with two letters, one for W-I and one for DAW, in which both companies declined to rescind their proposed no-smoking policies, but did offer to negotiate about them be-

fore implementation on July 1, 1987. He disagreed with Bledsoe's assertion that implementation of the policies would violate either the collective-bargaining contracts or the Act. Nonetheless, he said, both companies stood willing to bargain in good faith about the bans if bargaining was requested. To support his argument that they did not violate the contracts, he observed that they were silent about smoking. He asked Bledsoe to advise him what contract provisions led him to believe that the contract would be breached if the ban was instituted. Bledsoe did not respond further. Nonetheless, both companies decided to await the 1988 negotiations to pursue the matter, apparently making the judgment that earlier implementation would unnecessarily exacerbate the situation before bargaining even began.

On various dates in 1988 the Unions opened the contracts at other locations. Bannister responded for both companies. He proposed some contract modifications including a "substance abuse program" to become effective on January 1, 1989. At the end of each letter he included language identical or similar to the following:

Subject not proposed for negotiations that the Company hereby offers the Union an opportunity to discuss, the Company intends to modify the "Safe Practices Guide," which includes the "Company Plant Rules." [Sic.]

Said "Safe Practices Guide" and "Company Plant Rules" shall be modified as follows: "Smoking is prohibited on all Company property and in all Company vehicles." Effective January 1, 1989.

As noted, Peshastin was the last contract to be reopened. Bannister explained that because Peshastin came so late in the year, and the other facilities were already undergoing strikes, he did not write the same letter to the Charging Party. Indeed, he was unable to attend the opening (and only) round of local negotiations for Peshastin. He delegated that duty instead to Phil Bradetich. Bradetich was the corporate director of safety and performed various duties, including employee relations/industrial relations. Bradetich had been in attendance at the central table in Portland and some of the local table negotiations elsewhere. He was quite familiar with Respondent's point of view.

Prior to delegating Peshastin to Bradetich, Bannister had not prepared a letter such as that quoted above, nor had he prepared Respondent's counterproposals with respect to the Peshastin contract. Accordingly, Bradetich, in conjunction with plant manager Steve Rossing, prepared a draft of the document which has been received in evidence as Joint Exhibit 13. A copy was sent to Bannister for his review. Upon looking it over, he noticed that the draft omitted the substance abuse program and no-smoking policy issues which had been included in the letters sent to the other locations. He telephoned the office secretary at the Peshastin plant and asked her to include the phrases "negotiate a 'substance abuse program'" and "no-smoking policy" at the bottom of that exhibit. The final version of that exhibit contains those phrases.

On August 25, 1988 representatives of Respondent and the Charging Party met in Wenatchee to discuss the Peshastin local issues. Representing the Union were Pieti of the Western Council, Local 2841 President Barry Moats, and three

²That "understanding" is more than simple speculation. For almost 30 years the United States Surgeon General has required warnings of possible lung disease on cigarette packages. The issue reached a new crescendo on February 20, 1990, when Louis Sullivan, Secretary of the Department of Health and Human Services, issued a report to Congress finding that smoking-related diseases were costing the United States public more than \$52 billion annually. That figure, according to the report, amounts to an annual expenditure of \$221 for every man, woman, and child in the nation.

On the same day, a major union, the Service Employees International Union, AFL-CIO, issued a report saying that 78 percent of the strikes which occurred throughout the nation in 1989 were caused by disputes over health care coverage. It said this broke a 40-year period where strikes were not so motivated. These strikes, said the SEIU, cost the economy over \$1.1 billion in lost wages. (San Francisco Examiner, Feb. 20, 1990, publishing UPI wire report.)

While the SEIU report (at least the news story) does not refer to smoking related diseases as a cost of driving up health insurance costs, it is hardly a wild guess to conclude that elimination of the \$52 billion referred to by Secretary Sullivan would greatly reduce health insurance premiums and significantly reduce the number of strikes over health issues.

³Pieti is the area representative for the Western Council of Industrial Workers, the Charging Party's intermediate parent. Pieti represented Local 2841 in its 1988 negotiations with Respondent.

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committeemen. Company representatives were Bradetich, Plant Manager Rossing, and a man identified as Dean Weaver.

Although Pieti and Bradetich's testimony is somewhat different, it appears that during the course of the meeting the no-smoking policy was raised and discussed.⁴ The parties were in agreement that the substance abuse policy was appropriate for the central table as it was already being discussed there. Pieti declined, however, to accept the no-smoking policy as Bradetich outlined it. He instead proposed that smokers be limited to certain locations away from the mill itself including an old lunchroom and the boilerroom. Nothing was resolved on that date with respect to no smoking and the parties went on to discuss the other proposals. Bradetich testified, without contradiction, that the no-smoking proposal was intended to be a modification of the plant rules which are not considered to be part of the collective-bargaining contract proper.

The August 25 meeting was the only meeting dealing directly with Peshastin falling within the category of a "local issue" meeting. According to Pieti, the strike ensued directly after that and the strike settlement was signed before the parties ever got back together. He says, "We weren't allowed to settle local issues."

C. The Closure of Issues Clause

On September 9, in order to settle the strikes at all locations for both companies, a memorandum of agreement was signed "Extending and Renewing Existing Agreements." This memorandum consisted of 5-1/2 single-spaced typed pages dealing principally with "big table" issues. It covered the Peshastin mill, as well as the mills in Coeur D'Alene and Colburn, Idaho, Thompson Falls, Montana, and the mill in nearby Cashmere. The preamble to the memorandum states the parties "agree to the following amendments and revisions of each individual W-I Forest Products Company, L.P., collective bargaining agreement in full settlement of all subjects of collective bargaining." Articles VIII and IX, quoted below in the footnote,⁵ essentially say that matters which had not been agreed upon at either the central table or the local tables were considered withdrawn for the term of each collective-bargaining agreement unless they had been signed or initiated at the time the memorandum was signed and ratified.

Both Pieti and Bannister are in agreement that paragraph IX,A deals with the big table issues and IX,B deals with

local issues. Bannister says they covered those proposals which were aimed at insertion in the collective-bargaining agreement. Pieti was not asked whether he understood that limitation on sec. IX,A, but agrees that sec. IX,B was designed to cut off unresolved local issues from being raised in the future.

D. Managements Rights

The new collective-bargaining contract, in addition to the matters set forth in the strike settlement agreement, also carried over the management's rights clause of the preceding contract. The clause is quite broad, reading as follows:

Article 2, Section 2. The Company shall have all of the authority customarily and traditionally exercised by management except as that authority is limited by the express or specific language in the provisions of this Agreement. Nothing in the Agreement shall be construed to impair the right of the Company to conduct any or all aspects of its business in any and all particulars except as expressly and specifically modified within the terms and provisions of this Working Agreement. Among other things which are not affected by this Agreement is the exclusive right of the Employer to determine the products to be produced or manufactured, the location of its plant or operations, the methods, processes and means of production, marking, naming, manufacturing and sale or distribution of its products, the increase and decrease of its workforce as dictated by operational requirements, the schedule of hours of work, shifts, and overtime and the maintenance of an efficient and properly disciplined workforce as necessitated by the requirements of the operations and the conduct of sound business principles as determined by the Employer.

E. Implementation of the No-Smoking Policy

The no-smoking policy was actually implemented on January 1, 1989. It was not limited to the Peshastin operation, but was systemwide insofar as Respondent was concerned. It also appears to have been systemwide for the DAW locations. Bannister testified that smoking ban unfair labor practice charges were filed only at Peshastin, not anywhere else.

The actual announcement of the January 1 implementation occurred 2-1/2 months beforehand. On October 18, 1988, Respondent's sawmill superintendent Chip Baird posted a notice in five locations in the plant. Each of these locations was in a breakroom or area of high visibility. The language of the notice is set forth in the footnote below.⁶ The notice received immediate and widespread attention and affected employees in both management and in the bargaining unit, including union trustee and Shop Steward John Ellis as well

⁴ Pieti says he brought up the no-smoking proposal himself as they went through Respondent's proposals. Bradetich says he did not give a copy of Jt. Exh. 13 to the Union until after the meeting ended as he had planned to use the document only as his own guide. As the meeting ended, he caused sufficient copies of the document to be photocopied and these were distributed to the union team. This difference in recollection is insignificant.

⁵ VIII. LOCAL ISSUES

Local issue language changes shall be incorporated into those agreements where local issues have been mutually agreed to, and signed off.
IX. CLOSURE OF ISSUES

A. All issues upon which authority to negotiate was delegated by local Unions and district councils to the IWA and WCIW or their designated representatives, not covered herein, are withdrawn and closed for the term of the bargaining agreements as modified.

B. Other issues opened either by local Unions, district councils or the Company not included in this settlement are withdrawn for the term of the bargaining agreements if unresolved because not signed or initiated as of the time this Settlement Agreement is signed and ratified.

⁶ As of January 1, 1989, a no-smoking policy will be in effect. There will be no smoking in vehicles or equipment parked on company property.

The "Safe Practices Guide" and "Company Plant Rules" shall be modified appropriately to reflect this policy.

This notice is being issued at this time in hopes that perhaps in the next 3 months, those of you who do smoke, may find it easier to "ease" into a smokeless workday.

It is understandable that the "no smoking" rule will be difficult for many of you. And we thank you for your cooperation.

as Baird himself, and his superior, Plant Manager Rossing, all of whom are smokers.

The rule was rather quickly incorporated into three company documents. Respondent began typing the rule in the front page of the Safe Practice Guide which was distributed to new employees. It also appeared in reprinted plant rules and safety notices. Respondent's Exhibits 16 and 17. Both of the latter two documents are headed with a notice that a breach of any of those rules was ground for immediate disciplinary action, including suspension or discharge.

On December 20, 1988, at the behest of Ellis, the Union filed a grievance asserting that the no-smoking rule was being improperly implemented as it had been an unresolved local issue during the August 25 negotiations and had been "closed" by the strike settlement agreement. On December 23 Plant Manager Rossing denied the grievance saying that although the policy had been announced during local negotiations it was not a bargaining issue. He went on to say that a violation of the rule would be considered an act of "gross misconduct." Thereafter the rule was put into effect and several employees were "white-slipped," i.e., given warnings.

Article 8 of the new collective-bargaining contract provides that Respondent will issue warnings to misbehaving employees before exercising the right of discharge unless the behavior constitutes "gross misconduct." Rossing's response to the grievances seems to be a message to smokers that they will be discharged without benefit of a warning. Despite his admonition, the white slips followed, though there is some tentative testimony that warnings have been since dropped in favor of discharge.

F. The Effect of the Rule

Although there is evidence that the rule is occasionally broken surreptitiously, it is clear that the rule is being enforced against all employees at the plant, bargaining unit, and management alike. Not only is Baird a smoker, but his superior, Rossing is, too. So are Ellis and numerous bargaining unit employees. The record contains testimony regarding the length to which employees must now go to satisfy their habit. It appears that upper management, including Rossing and Baird, as well as bargaining unit employees, now walk, depending where they are stationed within the plant, between 600 and 1500 feet to a grassy area near a railroad siding. It should be noted that Peshastin is located in the northeastern portion of the Cascade Mountains, an area which accumulates a large amount of snow during the winter. Leaving the premises for a cigarette entails, in that circumstance, quite a bit of discomfort. On the positive side, however, Baird, at least, concedes the rule has reduced his smoking by half.

IV. ANALYSIS AND CONCLUSIONS

A. Introduction

It should be noted at the outset that the complaint is limited to the implementation of the smoking ban. It does not in any way allege that the discipline which Respondent might choose to levy upon an employee for an infraction of the rule violates Section 8(d) or Section 8(a)(5). Since a breach of the rule at the very least gives rise to a warning, and may result in discharge, that omission is a puzzle. Clearly the appropriate discipline to be meted out is a mandatory subject of bargaining. *Capital Times Co.*, 223 NLRB 651

(1976); *Purolator Products Co.*, 289 NLRB 986 (1988). It may be that the Union failed to demand bargaining on that subject or there may be some other defect to such a claim. Whatever reason there may be, clearly the issue has not been noticed by the complaint or litigated and the Board may not address it.

As written, the complaint alleges that the implementation of the smoking ban at Peshastin breaches the good-faith bargaining obligation of Section 8(d) of the Act in that it assertedly is a unilateral change in working conditions. Section 8(d) defines the topics over which parties must bargain and codifies those mandatory subjects of bargaining which have been incorporated in the collective-bargaining contract for the term of that agreement. It also bars parties who unsuccessfully sought to obtain contract language covering a mandatory subject during negotiations from forcing the other party to again bargain over that subject during the contract term.⁷ Generally speaking, therefore, a party which imposes a change in a mandatory subject during the course of the contract, breaches Section 8(d) and therefore Section 8(a)(5). *NLRB v. Katz*, 369 U.S. 736 (1962); *Kal Kan Foods*, 288 NLRB 590 (1988); *Master Slack Corp.*, 230 NLRB 1054 (1977).

In order to determine, therefore, whether there has been a violation of Section 8(a)(5) of the Act one must first determine whether the subject matter in question is a mandatory subject of bargaining. If so, there is the issue of whether the change has actually had a significant impact on working conditions. There are a number of cases which hold that even though the subject might be a mandatory bargaining topic, the unilateral change had no real impact on any working condition and therefore no unlawful unilateral change had occurred. *Rust Craft Broadcasting of New York*, 225 NLRB 327 (1976); *Peerless Food Products*, 236 NLRB 161 (1978); *Weather Tec Corp.*, 238 NLRB 1536 (1978); *Clements Wire & Mfg. Co.*, 257 NLRB 1058, 1059 (1981); *United Technologies Corp.*, 278 NLRB 306, 308 (1986); *St. John's General Hospital*, 281 NLRB 1163, 1168 (1986).

Finally, assuming that it did have an impact on a working condition, there is still the question of waiver. Quite often noncontract matters, such as plant rules, have a life of their own and a union's waiver of the right to bargain over them can be inferred from circumstances. One common form of waiver is where the employer raises an issue, notifies the union of the problem and the manner in which it intends to deal with it, simultaneously offering to bargain over it. When the union declines to bargain despite a fair opportunity to do so, a waiver will commonly be found. *Shell Oil Co.*, 149 NLRB 305 (1964); *American Cyanamid Co.*, 185 NLRB 981, 987 (1970); *Citizens National Bank of Willmar*, 245 NLRB 389, 390 (1979); *Castile-Pierce Printing Co.*, 251 NLRB

⁷ Sec. 8(d).

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party . . . and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract [emphasis added].

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conduct..." Accordingly, in the face of such bold contractual language, clearly written and expressed, it can be said that the old monitoring agreement significantly infringes on Management's rights as specified in Article 10 supra. Of course, such cannot be had now.

While Union would have the Arbitrator believe that an employee is with the right to smoke, it seems to have forgotten that any such right must be balanced against Company's duty to protect the work force and maintain a safe, clean work environment and its right to see that a reasonable and minimum level of production is had. Here, Company's testimony establishes a nexus between excessive restroom time and lagging production. While I would agree that Management may not arbitrarily determine what is reasonable and/or proper restroom time from a quantitative standpoint, it cannot be said that Management is without authority to limit one's use of the restroom and take the necessary action for making certain that it serves its designed purpose. Certainly, a restroom is not to be favored as a lounge and/or gathering place for conversation, and for smoking of tobacco products. Other facilities are available for employees as seen in connection with their morning and afternoon breaks and a thirty minute lunch period. The fact that employees were using the restroom for other than the chief purpose it was designed for, prompted a Co. memorandum to all employees, dated August 12, 1985 in an effort to gain their cooperation for proper restroom usage. The memorandum reads as follows:

"The restroom privilege is being grossly abused and this must be corrected. I do not intend to deny anyone the use of a restroom, when it is truly needed, but I feel people are using them as a place to meet and/or smoke and talk. Too many people are going at once and staying too long.

In an effort to correct this situation, the following rule will go into effect immediately. Anyone going to the restroom must be released by a supervisor or floor person while they are gone. If this does not correct the problem, I will seriously consider eliminating smoking in the restrooms."

In a manner of speaking, it can be said that this action "conflicts" with the mutually reached monitoring agreement, in that it represents a unilaterally fashioned rule by Management and it serves to further limit one's restroom privileges. Interestingly enough, Union took no action (grievance) with this memorandum. However, it does strenuously grieve the one sentence paragraph of the aforementioned Company memo, dated April 23, 1986, which limits smoking in certain places within the plant and strictly

prohibits smoking from within Company's restrooms. Since the two actions taken by Management differ as to content and subject matter, I cannot agree that Union's failure to grieve the August 12, 1985 memorandum supra estopped it from doing so. Some eight months later. But in bringing this matter on to arbitration Union has flatly failed to show that Article 10 supra and/or another provision(s) of the Agreement precludes Company from making and enforcing a reasonable rule concerning employees' smoking on Plant premises. Indeed, "work time is for work"; and with the rights granted employees for smoking on three specific occasions during their eight hour tour of duty, it must be recognized that Management has sought a successful balance between Company's right to expect "eight hours work for eight hours pay" and a worker's right to enjoy rest and relaxation during the course of his/her work schedule. To be sure, in no way has Union shown that the new rule, as highlighted by the phrase "no smoking in the restrooms," is unreasonable. Nor has it been able to show that said rule is punitive in nature and has harmed and/or injured any employee in any way or manner whatsoever. Thus, Company's action, as properly tied to its given rights via Article 10 supra, must be allowed to stand.

In conclusion, and for the reasons so stated, it is hereby held that Company's action for promulgating and implementing a rule designed to limit smoking and prohibiting smoking in the restrooms within its plant does not conflict with the parties' collective bargaining Agreement. Moreover, with the monitoring agreement not having any force and/or effect on the parties during the time in question, it cannot be said that employees' right and privilege to use plant restrooms has been limited and/or infringed upon. These conclusions are drawn as a result of Company's showing that its action was legal and valid, properly tied to legitimate business considerations, and without any harm/injury being incurred by members of the bargaining unit.

Accordingly, the following Award is rendered.

AWARD

The grievance is denied.

CLARK COUNTY, WIS. —

Decision of Arbitrator

In re CLARK COUNTY (Neillsville, Wis.) and CLARK COUNTY LAW ENFORCEMENT ASSOCIATION (WPPA/LEER), Grievance No. 85-141, WERC Case No. A/P M-86-214, September 26, 1986

Arbitrator: Richard John Miller

WORK SCHEDULES

— Unilateral change — Light duty
— Disability leave >2.01 >100.47

County had authority under management rights clause to change deputy sheriff's schedule from normal-duty to light-duty work, regardless whether he was on disability leave.

WAGES

— Overtime — 'Out-of-duty' employee >100.48 >100.52

County properly paid deputy sheriff overtime only for hours in excess of eight per day for time he spent in court appearances while on disability leave, where deputy's status was that of "out-of-duty" employee, not "off-duty." Scheduling of court time constituted permissible change from normal work to light duty, which was only work deputy physically could perform, and comported with general practice of scheduling court appearances during regular work hours to avoid overtime; payment method was same as that used to compensate employees for jury time and conformed to overtime provisions of contract; provision that "injury or illness is considered as time worked" applies only to vacation entitlement.

Appearances: For the employer — Kathryn Frenn (Mulcahy & Wherry), attorney; Walter Oldham, traffic captain; Rosalind Chubb, clerk; Sharon Rogers and Ray Conzenius, board of supervisors. For the union — Thomas Rudebusch (Cillen, Weston, Pines & Bach), attorney; Len Jarlarski, business agent; Louis Albrecht, detective sergeant.

'OUT-OF-DUTY' EMPLOYEE

Issued as Stipulated to by the Parties

MILLER, Arbitrator: — (The Issue Is: —)

Did the County by not paying the Grievant for 24 hours at the overtime rate on August 27, 28, 29, 1985, violate the Contract? If so, what is the remedy?

Relevant Contract Language

ARTICLE X — OVERTIME

All employees hired are covered by this Agreement and shall be paid one and one-half (1½) times their normal hourly rate for all time worked in excess of the normal work schedule including hours assigned in order to meet the 2080 hour requirement. For purposes of determining hourly rate, the annual base rate shall be divided by 2080.

ARTICLE XV — VACATIONS

SECTION 6.

For purposes of this Agreement, an on or off the job injury or illness is considered as time worked.

ARTICLE XXV — COURT TIME

In the event off-duty employees are called to work or to appear in court the employee shall receive a minimum of two (2) hours pay at time and one-half. Minimum call-in pay does not apply when called in early for a regular shift or required to stay after a regular shift. This minimum of two (2) hours will apply once a day. All witness fees shall immediately be forwarded to the County Clerk to become property of the County. Minimum call-in pay does not apply when called in early for a regular shift or required to stay after a regular shift.

ARTICLE XXXIII — JURY DUTY

An officer required to serve as a juror shall be paid his regular wages during the entire period of jury duty, minus the compensation paid to such officer for serving as a juror, which will be turned over to the Employer. If the total hours worked and/or spent on jury duty exceed the number of hours spent on a duty day, the officer shall be paid overtime at the rate of time and one-half for all time exceeding the normal work day. If the officer is required to serve as a juror during his regularly scheduled off day or vacation, such officer shall be entitled to overtime at the rate of time and one-half for all hours serving as a juror on those days.

As soon as an officer is released from jury duty, he shall notify the department and be available for assignment.

ARTICLE XXXIV — MANAGEMENT PREROGATIVES

1. Except as otherwise specifically provided in this Agreement, the County retains all the rights and functions of management that it has by law.

2. Without limiting the generality of the foregoing, this includes:

A. The determination of services to be rendered and the right to plan, direct and control operations.

C. The determination of the size of the workforce; the assignment of work or workers; the determination of policies affecting

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At Mr. Ditch's direction, Mr. Butcher prepared an overlay of the cafeteria floor plan for the arbitration hearing. Mr. Ditch testified that the overlay showed air flow in the cafeteria. Mr. Ditch testified that air flow shown on the overlay was based on his judgment regarding probable air flow and was not based on any test of actual air flow in the cafeteria. He testified that his judgment regarding probable air flow was based on the location and shapes of air supply and return air ducts in the cafeteria.

Ms. Ernestine Halyard, Chief Steward, testified that the customary practice of employees smoking at the first table was important and that the Company's unilaterally changing that practice was unfair. She testified that it caused discontent and unrest. Ms. Cheryl Burnette, Union Steward, testified similarly.

Positions of the Parties

UNION: The Union contends that the Company violated the Agreement when it designated the first table as a no smoking area.

The Union contends that the Company's designating the first table as a no smoking area violated Article XV — GRIEVANCE PROCEDURE, Section 15.02, Part A. The Union contends that the Company failed to give notice of the change as required by Subpart 15.02 A 2.

The Union contends that the four conditions set forth under Subpart 15.02 A 4 must have been met in order for the Company to have legitimately established a no smoking area and that those conditions were not met in the present case.

The Union contends that the evidence establishes a past practice whereby employees smoked or didn't smoke at the first table in accordance with their individual preferences and that the evidence regarding the practice was unequivocal, clearly enunciated and acted upon, readily ascertainable over a reasonable period of time as a fixed and established practice, and accepted by both parties.

The Union contends that the Company's action in designating the first table as a no smoking area was discriminatory.

The Union contends that the Company had no business need to establish a no smoking area.

The Union contends that the Company's action was unreasonable. The Union cites an arbitration decision in support of this point.¹

The Union contends that the Open-line program deprives employees of exclusive representation by the Union in violation of the Preamble of the Agreement and constitutes a substitute for the grievance procedure set forth in Article XV — GRIEVANCE PROCEDURE of the Agreement.

The Union requests the Arbitrator grant the grievance and direct the Company to authorize smoking at the first table. The Union further suggests that the Arbitrator approve the Company's designating the corner table as a no smoking area.

COMPANY: The Company denies that it violated the Agreement.

The Company contends that Article XV, Section 15.02, Part A explicitly authorizes it to change practices or customs and that the Union's grievance objecting to such a change must be denied unless the Union establishes that one of the conditions enumerated in Subparts 15.02 A 4 (b) through (d) is established.

The Company contends that the Union has failed to establish the past practice it alleged. The Company contends that the Union's acknowledging that it might designate another table as a no smoking area demonstrates the non-existence of the past practice alleged by the Union.

The Company contends that the burden is on the Union to prove that the Company's rule regarding no smoking at the first table was unreasonable. The Company cites a number of arbitration decisions in support of this point.²

The Company contends that the Union has failed to prove that the Company's designation of the first table as a non-smoking area was unreasonable. The Company cites three arbitration decisions in support of this point.³ The Company contends, on the contrary, that its designation of the first table as a non-smoking area was eminently reasonable. The Company cites a number of arbitration decisions⁴ and a report submitted during the arbitration hearing in support of this point. The Com-

¹ Maryland Specialty Wry, Inc., 74 LA 983 (1981) (Buchanan, Arb.) and Jones Dairy Farm, 79 LA 1 ARB 9809 (1979) (Maschka, Arb.).

² Jones Dairy Farm, supra; Tri-State Transit Authority, 71 LA 718 (1978) (Bahr, Arb.) and Am. Int'l, 68 LA 9083 (1966) (White, Arb.).

³ Lorton Industries, 73 LA 308 (1980) (Gresh, Arb.) and HEW, Social Security Administration, 79 LA 2 ARB 1847 (1979) (Lambert & Hill, Employees Ass'n, Arb.). 77 LA 9612 (1979) (Kotter, Arb.) and United Fuel Gas Company, 58 LA 1459 (1968) (Tople, Arb.).

⁴ Sheets of James I. Report to The New York Academy of Medicine, May 29, 1964 entitled The Problem of Passive Smoking and The Dow Chemical Company LQ 11 Quid Program.

⁵ Lorton Industries, 73 LA 308 (1980) (Gresh, Arb.).

pany also cites Collier County Ordinance No. 78-24, Florida Revised Statutes, §255.27, State of Florida Department of Health and Rehabilitative Services, No. 0-60-1, State of Florida, Department of Highway, Safety and Motor Vehicles Rules, §15-11.01, et seq. and Smoking Policies of the University of Florida, Gainesville, Florida.

The Company contends that the conditions set forth in Article XV — GRIEVANCE PROCEDURE, Section 15.02, Part A had been met in the present case and that its designating the first table as a non-smoking area was contractually proper.

The Company contends that it has retained those rights and authority necessary to its successfully carrying out management of the enterprise. The Union cites the Elkouri treatise in support of this position.⁵

The Company contends that it has an inherent right to promulgate rules regarding the regulation of employee conduct on Company premises. The Company cites a number of arbitration decisions in support of this position.⁶

The Company contends that the existence of a past practice does not constitute abrogation of its right to regulate and police the practice and to make administrative changes regarding the practice. The Company cites the Elkouri treatise and an arbitration decision in support of this point.⁷

The Company requests the Arbitrator deny the grievance.

Discussion

The issue in this case is framed by item 5 of Subpart 15.02 A of the Agreement which reads in part as follows:

The arbitrator will reverse or augment the instituted change in the event the Company's actions contravene the above conditions.

The issue, therefore, is whether the Company's designating the first table as a no smoking table on October 23, 1981 violated the conditions set forth in Subpart 15.02 A 1 through 4.

Subpart 15.02 A does not prohibit the Company from changing customs or

practices. The first sentence of that subpart reads in part: "(T)his shall not serve to deny the right of the Company to change customs or practices provided the following requirements are met . . ."

Subpart 15.02 A lists four requirements. The first requirement relates to the Company's giving notice to the Union of the Company's intent to change "what the Union claims to be a custom or practice". The second requirement relates to discussions between Company and Union representatives, and the third requirement mandates that Company and Union representatives attempt to reach a mutually satisfactory understanding with reference to the matter. The evidence establishes, of course, that the Company did not advise the Union of its intention to establish a no smoking policy. Nonetheless, the evidence establishes that subsequently, both the Company and Union did substantially comply with the first three requirements set forth in Subpart 15.02 A of the Agreement.

The fourth requirement specifically provides for arbitration in the event the first three requirements do not produce a satisfactory resolution of the question. The fourth requirement sets out four conditions; it provides in part:

The purpose of this arbitration will be for the arbitrator to determine:

a. Whether or not there is in fact such a custom or practice between the parties that binds the parties.

b. Whether or not the Company's action is based on discrimination because of Union activities, sympathies, desires, or because of race, color or creed.

c. Whether or not the Company has a legitimate business reason or purpose for the change.

d. Whether or not the change proposed is reasonable in light of the interest of both sides to the contract.

Condition 4a, in effect, establishes that a prerequisite for an arbitrator's limiting the Company's right to institute the change in question is a determination that there exists a custom or practice that binds the parties. In the present case, however, it is not necessary to determine whether such a custom or practice exists. Assuming without deciding — that a binding custom or practice does exist, nonetheless the Arbitrator must deny the grievance for reasons stated hereinafter.

The Union contends that the Company's action in designating the first table as a no smoking table was discriminatorily motivated. In support of this contention, the Union established that Union business was on occasion conducted at the first table. Mr. Ditch, on the other hand, testified that he

⁵ P. Elkouri and E. Elkouri, How Arbitration Works 412, 417 (3rd ed., 1973) (hereinafter "Elkouri").

⁶ West Virginia Armature Company, Inc., Blackfield Plant, 81 LA 9171 (1981) (Hunter, Arb.); Bud Manufacturing Co., 77 LA 9350 (1977) (Pridmore, Arb.); Caterpillar Tractor Co., 88 LA 1 ARB 1831 (1980) (Babshaw, Arb.); East Metals Corp., 70 LA 278 (1978) (Roberts, Arb.); Arvon Press Co., 80 LA 18379 (1980) (Keimann, Arb.); and MacMillan Black & White, Inc., 70 LA 687 (1978) (Doeber, Arb.).

⁷ Elkouri at 400-401 and Bethlehem Steel Corp., 50 LA 202 (1968) (Stoneman, Arb.).

and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 199, FMCS Case No. 81K/03654, Grievance No. FM-77-81, Arbitrator's File No. 99-342, March 31, 1982.

Arbitrator: Jack Clarke, selected by parties through procedures of Federal Mediation & Conciliation Service

WORKING CONDITIONS

—Designating no-smoking area in cafeteria ► 118.25 ► 124.01 ► 24.351

Employer had right to designate certain table in employee's cafeteria as no-smoking area based on area building supervisor's study of ventilation plan for cafeteria area that led to determination that table was only one in cafeteria to which smoke coming from smoking table would not be drawn, notwithstanding claim of past practice under which employees smoked or did not smoke at table selected as no-smoking since agreement does not prohibit employer from changing custom or practices provided certain requirements are met. Designation of no-smoking area was not motivated by any anti-union bias but was based on building supervisor's opinion regarding probable air flow in cafeteria, evidence of health risk from passive smoking, and employer's interest in maintaining healthy work environment and minimization of its own expenses and potential liability.

Appearances: For the company — George K. McPherson, Jr. and Michael S. Thwaites (Smith, Currie & Hancock), attorneys; Gregory K. Ezell, area personnel manager; Robert E. Overton, personnel director; Jack Dith, area building supervisor; Bruce L. Butcher, personnel staff assistant. For the union — Gerald DeWolf, local business manager; Earnestine Halyard, chief steward; Cheryl Burnette and Dorothy Kundraitus, stewards.

NO-SMOKING TABLE

CLARKE, Arbitrator: — Grievance No. FM-77-81 was signed by a large number of Company employees and filed in writing on November 24, 1981. By letter dated November 25, 1981 from Mr. Gerald DeWolf, Business Manager, IBEW Local Union #199 to Mr. Gregory K. Ezell, Company Area Personnel Manager, the Union withdrew Grievance No. FM-77-81 and objected to the Company's having designated a table in an employee's cafeteria as a no smoking area. That letter sought immediate arbitration in accordance with Article XV, Section 15.02 of the Agreement between the parties effective July 7, 1980

(hereinafter "Agreement"). Subsequently the parties treated the November 25 letter and Grievance No. FM-77-81 as one grievance.

Subsequently Mr. Ezell and Mr. DeWolf discussed the grievance in telephone conversations. Later Mr. Ezell, Mr. DeWolf, and Mr. Bruce Butcher, Company Personnel Staff Assistant, viewed the cafeteria and discussed the reasons the particular table was selected as a no smoking area. They discussed the Union's alternative proposal, that is, selection of a table in the corner of the cafeteria. Despite these discussions, the grievance was not resolved and was referred to arbitration.

Using the services of the Federal Mediation and Conciliation Service, the parties had selected Jack Clarke to arbitrate another grievance. When that grievance was resolved prior to arbitration, the parties agreed to present the present grievance to Arbitrator Clarke.

Pertinent Provisions of the Agreement Between the Parties Effective July 7, 1980

ARTICLE IX HEALTH AND SAFETY

9.01 A. Both the Company and the Union recognize the importance of maintaining high standards of safety and health in order to prevent industrial injury and/or sickness.

ARTICLE XV GRIEVANCE PROCEDURE

15.02 A. The Company will continue in effect such generally recognized customs and practices as are now in effect and which are not covered by the terms of this Agreement, but this shall not serve to deny the right of the Company to change customs or practices provided the following requirements are met:

1. The Company will give notice to the Union of the Company's intent to change what the Union claims to be a custom or practice and will state the reasons for the change.

2. The Union, within seven (7) days of receipt of the notice given above, may request a meeting with Company representatives if it so desires, in order to discuss the Union's position on the change, offer views to the change, or objections to the change.

3. During this meeting the Company and Union will endeavor to reach a mutually satisfactory understanding with reference to the matter.

4. In the event the Union still claims a "generally recognized custom or practice" and the Company is unable to agree that

such is a custom or practice within the meaning of the first paragraph of this section, or in the event the Union does not agree to the change or there is not a mutually acceptable alternative within two (2) weeks of the Company's last stated position, the matter may be referred directly to impartial arbitration by the Union. The purpose of this arbitration will be for the arbitrator to determine:

a. Whether or not there is in fact such a custom or practice between the parties that binds the parties.

b. Whether or not the Company's action is based on discrimination because of Union activities, sympathies, desires, or because of race, color or creed.

c. Whether or not the Company has a legitimate business reason or purpose for the change.

d. Whether or not the change proposed is reasonable in light of the interests of both sides to the contract.

5. The arbitrator will reverse or augment the instituted change in the event the Company's actions contravene the above conditions. The ruling of the arbitrator will go no further than necessary to resolve the dispute as set forth above, and his ruling in this matter will be final and binding.

Background

In this Background, undisputed facts have been summarized. Where evidence relating to the existence or non-existence of a particular fact conflicts, the evidence has been summarized.

The Company provides telephone service in southwestern Florida. It maintains a major facility, commonly known as the Lee Street Building, in Ft. Myers, Florida. The Company employs approximately 700 persons in that building.

Sometime prior to October, 1981 the Company established an "Openline" Program. The Openline Program allowed employees to submit questions and suggestions directly to upper management officials. Anonymity was guaranteed employees who submitted Openline suggestions or questions.

The Company has maintained a cafeteria in the Lee Street Building for several years. The cafeteria area includes a food service area, two vending areas, and several tables with chairs. Adjacent to the cafeteria but separated from it by normally closed doors is an Operator's lounge. The cafeteria is available to all of the Company's Lee Street employees.

The cafeteria is routinely used by Company employees for lunches and rest breaks. It has been used for employees' social functions including bridal and baby showers, and retirement parties.

No table in the cafeteria is or was reserved for any employee or group of em-

ployees. Any person entitled to use the cafeteria was entitled to sit at any table. Identifiable groups of employees did frequently sit at the same table from time to time, that is, one group of employees tended to sit at a specific table while another group of employees tended to sit at another table. A number of Operators, including some Union officials, tended to sit at the first table one encountered upon entering the cafeteria from the Operators' work area (hereinafter referred to as the "first table"). Union officers sometimes conducted Union business while seated at the first table.

There are five air supply and one return air ducts located in the cafeteria ceiling. One supply air duct is located between the first table and the adjacent table. Another air supply duct is located close to the corner table.

For several years prior to October, 1981 smoking was permitted in the cafeteria and Operator's lounge. Smoking was not permitted, however, in a number of work areas in the Lee Street Building including Operators' work areas.

The Company received two Openline suggestions regarding smoking in the cafeteria. The Company decided to designate a no-smoking area within the cafeteria. It directed Mr. Jack Ditch, Area Building Supervisor, to determine an appropriate area.

Mr. Ditch has held a stationary engineer's license from the State of Ohio since 1948. That license relates to heating and ventilation, air conditioning. Mr. Ditch has been a Maintenance Supervisor with responsibilities including heating and air conditioning since 1958. In 1952 he attended an eight month (eight hours per week) course in air conditioning and recirculation.

Mr. Ditch and Mr. Bruce Butcher reviewed the ventilation plan for the cafeteria area and observed the cafeteria while a number of employees were present. Mr. Ditch determined that the first table would be the optimum no smoking area.

Mr. Ditch testified that he chose the first table as the non-smoking table because it was the only one in the cafeteria situated such that, if designated no smoking, smoke would not be drawn from a smoking table to the no smoking table and could be reached without walking through a smoke area.

The Company caused a "No Smoking" sign to be placed on the wall immediately over the first table on October 28, 1981. The Union was not consulted regarding establishment of the no smoking area prior to posting the sign.

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rule to the connected discipline, asking the Board to explain why the two should be treated separately. In its decision responding to the remand, the Board held that if the rule itself lay at the "core" of entrepreneurial control, and was thus not a mandatory bargaining subject, then neither was the discipline. *Peerless Publications (Pottstown Mercury)*, 283 NLRB 334 (1987). Curiously, however, it retreated from its previous recognition of Justice Stewart's finding that Section 8(d) is a statute delineating limits. It said that the concept of "terms and conditions of employment" is deliberately broad and Congress intended it to be so. Yet, while embracing the circuit courts concern that a core rule and the discipline to be associated with it are to be considered together (thus, generally denying to an employee disciplined for its breach the right to bargained-for representation), it did agree with Judge MacKinnon that there may be exceptional cases for which an excessive penalty renders a rule mandatorily bargainable. I find myself in sympathy with all points of view here, but believe the Board had it right in *Capital Times* when it allowed for the bargaining severability of the rule and its discipline. The rule announced in the remand seems awfully brittle and destined to have unjust results.

Of course, plant rules, in general, have been held to be mandatory bargaining topics. *Womac Industries*, 238 NLRB 43 (1978); *Electi-Flex Co.*, 238 NLRB 713, 731 (1978). Yet there are obviously areas of rule making (employee ethics being the above-cited example) which are not covered by Section 8(d). No one questions, for example, at least in the absence of Section 7 restraint or coercion, an employer's unilateral right to set rules insisting on basic employee attributes such as honesty, sobriety, civility, good health,⁹ and competence. Of course there may be reasonable disputes over the application of these rules or whether a rule has been breached, but no one seriously argues that setting rules on those subjects is not within the employer's exclusive power. Congress, when passing Section 8(d), did not place those matters into the bargainable arena. Case law on these basic subjects, free of union animus complications, are nonexistent, no doubt due to universal recognition of that fact. If journalistic ethics also fall within that category, where then does a total ban on smoking fall? Is it within the area left to employers by Congress or is it in the bargainable arena?

I am persuaded that the mandatory nature of a smoking ban depends on which direction the parties wish to go. Do they wish to create a more healthful or less healthful working environment? Here, it seems to me that Respondent has taken steps to improve the health of its employees while the Union and the General Counsel seek only to maintain a less healthy environment. Usually a bargaining topic is mandatory or nonmandatory on its own terms no matter what direction a party wishes to go. *NLRB v. American National Insurance*, 343 U.S. 395, 404 (1952). Yet, when it comes to employee health, however, I conclude that the analysis does not obtain. It is clearly the nation's public policy, as set forth in various Surgeon Generals' reports, to try to control the nation's health costs by eliminating or reducing smoke-related diseases such as cancer, emphysema, and chronic bronchitis. These diseases have contributed greatly to the cost of health

and have made workers less productive. The Federal Aviation Administration accepted that policy on February 25, 1990, when it banned smoking on domestic commercial flights. I find, therefore, that the General Counsel and the Union are on the wrong side of this issue here, at least insofar as their position is inconsistent with national health policy.

But even insofar as national labor policy is concerned, it is inappropriate for the General Counsel, as representing the Government's point of view here, to be asserting that a union has the right to allow workers to degrade their own health as well as that of fellow employees who may inhale second-hand smoke. It was the purpose of the Wagner Act to allow labor unions the right to seek to improve their working conditions in the belief that improved working conditions would better contribute to the well-being of our society. Under the Wagner Act and its amendments workers were impelled to negotiate better wages and more healthy working conditions. In large part, of course, that has happened. This Union, however, joined by the General Counsel, seems to wish to go the opposite direction. That is contrary to the policy of the Act.⁹ Moreover, like honesty, sobriety, civility, good health, and competence, a smoking ban is insoluble from a bargaining standpoint. It is just not the sort of rule which is subject to the marketplace, amenable to give and take. And, to use the *Capital Times* phraseology, smoking is not necessary to enable an employee to do his or her job. It is better, I think, to recognize that total bans on smoking fall within Justice Stewart's area of indirect impingement on job security. I conclude that an employer's total ban on smoking is a nonmandatory subject of bargaining.¹⁰ Therefore, Respondent was free to implement it without the Union's consent.

This result is to be distinguished from other situations such as a partial ban or a union's demand to totally ban smoking. It may appear anomalous to so conclude, but I do not think it is. As I observed in the beginning of this discussion, it is not unusual, in unilateral change jurisprudence, depending on which party wants what from the other, to find oneself in unfamiliar territory. Symmetry is not always possible, nor is it always desirable. In any event, it is clear from an analysis of the cases that the Board has never squarely been asked whether an employer's unilateral total ban on smoking is a mandatory subject of bargaining. Naturally enough, therefore, it has not answered that question. It is true

⁹ Frankly, I find it difficult to believe that a labor organization would want to bargain over a total ban at all. Labor unions, like most groups, are made up of smokers and nonsmokers, some of whom are most militant in insisting upon their point of view. If that issue came to debate on the floor of a union meeting, I suspect it would be most divisive and might have unwanted internal political effects. It seems to me that most unions would not want to tackle the issue for that reason alone. Leaving it to the employer at least takes it out of the political environment and lets him take the heat (which this employer wants to do).

¹⁰ I recognize that there are cases decided by the Federal Labor Relations Authority in the federal sector which have required federal employers to bargain over similar bans. I regard those cases as distinguishable for the statute under which they have been decided is significantly different from Sec. 8(d). *Department of Health and Human Services, Indian Health Service, Oklahoma City*, 31 FLRA No. 33 (1988); 132 LRRM 2492 (D.C. Cir. 1989); *Fort Leonard Wood*, 26 FLRA 593 (1987). That statute requires a federal employer to bargain unless the rule is within the Agency's authority to set "technology, methods and means" of performing work. [Federal Service Labor-Management Relations Act, Sec. 7116(a)(1) and (5).] Sec. 8(d) of the NLRA approaches the question of bargainable issues from a totally different direction and is simply not comparable.

⁸ The Congress and the various states have imposed their values relating to employee good health in enacting statutes protecting the handicapped. Yet, it is quite clear that those laws describe rights much different from those referred to in Sec. 8(d).

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1293 (1980); *Dilene Answering Service*, 257 NLRB 284, 290 (1981) (holiday schedule issue).

A third, relatively common, waiver may be found through a broad managements-rights clause. Different language, however, may effect different results. *Southern Florida Hotel & Motel Assn.*, 245 NLRB 561, 567-568 (1979); *BASF Wyandotte Corp.*, 278 NLRB 181, 182 (1986); *Saints Mary & Elizabeth Hospital*, 282 NLRB 73 (1986). Cf. *Emery Industries*, 268 NLRB 824 (1984) (management's-rights clause coupled with past acquiescence). Also *Murphy Diesel Co.*, 184 NLRB 757 (1970), enfd. 454 F.2d 303 (7th Cir. 1971).

Here both parties have assumed that the no-smoking rule is a mandatory subject of bargaining as defined by Section 8(d) of the Act, an assumption which, in hindsight, seems dubious. Because of that assumption, however, Respondent strongly argues waiver. It recalls that beginning in 1987 it notified the Union of its intent to impose the ban. In 1988, at local bargaining throughout both the W-I and DAW systems, the smoking ban was raised, although at all locations other than Peshastin the ban was clearly aimed not at the collective-bargaining contract, but at a modification of the plant rules. I think it is fair to say, however, that the Charging Party at Peshastin, given the guidance it was receiving from Pieti, was not misled in any way about the noncontract nature of the Peshastin smoking ban. As with the other mills, it was not ever intended to be included as part of the collective-bargaining contract, but to be inserted in the plant rules in the same manner as at all the other sites.

B. The Closure of Issues Clause

I think it is reasonable to conclude that the closure of issues clause of the strike-settlement agreement, when the preamble and section VIII and IX,B are read together, does not apply to the ban. Section VIII states that local issue language changes are to be incorporated in those agreements where they have already been mutually agreed to prior to the strike settlement; and section IX,B states that other issues opened either by local unions district councils or the Company which are not included in the settlement are withdrawn for the term of the bargaining agreement if they have not been signed. To the extent there is any ambiguity in that language, it is resolved both by the preamble, which limits the memorandum to contact issues and by Bannister's unchallenged testimony that he, as a signer of the agreement (the only one to testify), intended the language to cover contract issues and nothing more. Indeed, insofar as plant rule matters are concerned there is no evidence that sign-offs or initialing was a procedure used when changing or installing a rule.

Based upon that analysis, I reject the General Counsel's contention that the closure of issues clause controls the smoking ban. As a rule matter, the ban was exempt from the closure of issues clause and the parties understood, or should have understood, that. Accordingly, I shall not discuss the General Counsel's primary theory any further. Instead, I shall analyze the matter as if it were a noncontractual change in working conditions.

C. Mandatory Subject of Bargaining

Thus, the question which must be answered is whether an employer's total ban on smoking is a mandatory subject of bargaining. Although facially it must be conceded that it

would appear to be, I am not convinced. Yet the issue must be decided before proceeding to the defenses of exceptions and/or waiver. If it is not a mandatory subject, then it is unnecessary to reach them.

For many years the Board and the Supreme Court have attempted to outline the scope of 8(d)'s reference to "terms and conditions of employment." The phrases "mandatory" and "non-mandatory" subjects of bargaining can lead to strange territory depending on which party wants what. In *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958), the employer bargained to a contract impasse over a so-called "bal-lot clause" requiring members to vote before striking over nonarbitrable disputes. The Court had no difficulty in concluding that the clause was unrelated to "terms and conditions of employment" and therefore the employer's insistence to impasse on the clause breached the good-faith mandate of Section 8(d) and Section 8(a)(5). In *Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), the union demanded that the employer bargain over retirees' health benefits. The Court found the employer's refusal to do so was not a breach of Section 8(d) because retirees were no longer employees and their well-being was not a vital concern to active employees.

In *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), the Court unanimously agreed that the contracting out of unit work fell within the mandatory scope of Section 8(d), but Justice Stewart, joined by Justices Harlan and Douglas, in a concurring opinion, noted that Section 8(d) is a statute which uses language of limitation and that Congress did not intend to place every decision an employer might make into the bargaining arena, even if the decision had some impact on job security. He said, "Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control If, as I think clear, the purpose of Section 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from the area." 379 U.S. 203 at 223 (emphasis added). This language has found general acceptance and has recently been followed. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). To be sure, that case dealt with corporate direction rather than indirect impingement on employment security, but it clearly demonstrates the correctness of Justice Stewart's observation that Section 8(d) is one of limitation.

Likewise, the Board's decision in *Capital Times*, 223 NLRB 651 (1976), appears to recognize his analysis. There the newspaper unilaterally imposed a code of journalistic ethics upon its news gathering staff, including a directive that reporters cease accepting gratuities from news sources. The Board found the imposition of the code itself (as opposed to the discipline to be levied for its breach) to be a nonmandatory subject and beyond the reach of Section 8(a)(5). It said the prohibition against reporters' accepting gifts was a proper exercise of a management right. It was not necessary, said the Board, for an employee to accept a gift from a news source to enable him to do his job. See also *Newspaper Guild Local 10 (Pottstown Mercury) v. NLRB*, 636 F.2d 550 (D.C. Cir. 1980), a remand clearly referencing Justice Stewart's *Fibreboard* language, but tying the ethic

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discipline case. Where an employee has violated a rule or engaged in conduct meriting disciplinary action it is primarily the function of management to decide upon the proper penalty. If management acts in good faith upon a fair investigation and fixes a penalty not inconsistent with that imposed in other like cases, an arbitrator should not disturb it. The mere fact that management has imposed a somewhat different penalty or a somewhat more severe penalty than the arbitrator would have, if he had had the decision to make originally, is no justification for changing it. The minds of equally reasonable men differ. A consideration which would weigh heavily with one man will seem of less importance to another. A circumstance which highly aggravates an offense in one man's eyes may be only slight aggravation to another. If an arbitrator could substitute his judgment and discretion for the judgment and discretion honestly exercised by management, then the functions of management would have been abdicated, and unions would take every case to arbitration. The result would be as intolerable to employees as to management. The only circumstances under which a penalty imposed by management can be rightfully set aside by an arbitrator are those where discrimination, unfairness, or capricious and arbitrary action are proved — in other words, where there has been abuse of discretion."

See also: Corn Products Refining Co., 21 LA 105, 107 (Gilden, 1953); Phillips Petroleum Co., 25 LA 568, 571 (Kadish, 1955); S.A. Shenk & Co., 26 LA 395, 397 (Stouffer, 1956); Campbell Soup Co., 26 LA 911, 913 (Larkin, 1956); Robertshaw-Fulton Controls Co., 36 LA 4, 7 (Hilpert, 1961); Enterprise Wire Co., 46 LA 359, 365 (Daugherty, 1966); Parkview-Gem, Inc., 59 LA 429 (Dugan, 1972); South Bend Tool & Die Co., 68 LA 536 (Traynor, 1977); Grand Haven Brass Foundry, 68 LA 41, 45 (Rounell, 1977).

If every arbitrator were to review the appropriateness of the penalties assessed by management to disturb that with which he disagreed, then as a practical matter, disciplinary policy would depend on the personal opinion of whatever arbitrator was chosen to hear a particular case, a result that would be intolerable as Arbitrator McCoy stated. In the absence of a clear contractual provision to the contrary, this Arbitrator will not assume that the parties intended that he displace their functions. Except where management has abused its discretion, employees should be well protected by vigilant Union representation.

For the reasons stated above, the Arbitrator, despite what he may personally feel about the extent of the penalty, is constrained to hold that there was cause to discipline Grievant for violations of Rule 1 of the Company Rules. The five-day suspension imposed by the Company was not an abuse of discretion in view of Grievant's past record. The Arbitrator therefore finds

that there was just cause to suspend Grievant for five days. The issue now turns to whether and how the procedural arguments raised by the Union affect this determination of just cause.

The Union argued that the disciplinary action in this case is controlled by Section 11.1 of the Agreement. According to the Union, Section 11.1 applies to any temporary suspension from work for disciplinary reasons and does not distinguish between "disciplinary layoffs" and "suspensions." In the event an employee receives a suspension of any kind, the Joint Standing Committee must meet on the first shift of the next working day to review the discipline. It argues further that had a Joint Standing Committee meeting been held the day after Grievant was suspended on July 15, the situation might still have been fluid enough to allow for compromise, that this was the purpose of the Section. The Company could have reduced or eliminated the suspension without incurring back pay liability for work that was never done. Since the Joint Standing Committee was not timely held, Grievant was deprived of an opportunity for effective negotiations that is guaranteed under the Contract, and a full back pay order is necessary.

The Company disputes this argument to contend that Section 11.1 applies only to the more serious types of violations where the employee is "suspended with pay for the remainder of the shift on which the alleged offense occurred" and the practice in the past supports this contention. At the hearing it also purported to draw a distinction between a suspension and a disciplinary layoff.

The Arbitrator has examined the Rules and the provisions of the Agreement relating to Suspension and Discharge, Section 11.1, and the Grievance Procedure, Section X. The rules provide in their introduction that "... the list ranges from ... to more serious violations (Group II) which would result in a suspension and ...". The Grievance Procedure in Section 10.2 would indicate that it applied to "disciplinary and discharge actions" and at Step 3 provides for reference to the Joint Standing Committee. Section 11.1 purports to deal generally with discipline of employees by layoff or discharge but then in Section 11.1(a) refers specifically to the case where "the employees may be suspended with pay for the remainder of the shift on which the alleged offense occurred." In Section 11.1(b) the Chapel Chairman is notified and the Joint Standing Committee meets "if an employee is suspended." Presumably, the suspension here

refers to the type of suspension under Section 11.1(a).

First, the Arbitrator sees no difference between a suspension and a disciplinary layoff. The terms are interchangeable when applied to a violation of rules or other employee obligations.

Under normal rules of construction of contracts a specific provision controls and governs a more general one and the terms of the former would be followed over those of the latter. In that respect Section 11.1 would be followed in case of any conflict with Section X. However, an agreement must be construed as a whole and parts interpreted in relation to other parts and provisions so that effect is given to all provisions. Each provision must be construed, if possible, in harmony with other provisions.

The Arbitrator was impressed by the Union's argument about the logic behind clauses like Section 11.1. Such an argument would carry considerable weight at the negotiating table. However, the Company's argument that Section 11.1 had a limited application was likewise reasonable, especially when it introduced evidence of past practice. In the light of the above the Arbitrator finds Section 11.1 to be insufficiently clear to carry the day for the Union. The reference in Section 11.1(a) to an employee who may be suspended with pay for the remainder of the shift on which the alleged offense occurred and the subsequent reference to that suspension in Section 11.1(b) lends credence to the Company's contention, especially in light of the attested practice that the Section was limited to those serious cases of violations during the shift when it was desirable to remove the violator from the premises. The Arbitrator suggests that perhaps during the next negotiation the parties might desire to clarify the meaning and interpretation of Section 11.1.

However, the Arbitrator doesn't consider it necessary to choose now between the contrasting views of the parties. In many cases of long term collective bargaining relationships, even where language may be clear, the parties may allow certain requirements of grievance processing and provisions relating thereto to lapse into sporadic or complete disuse. Where one party suffers in silence repeated instances of non-compliance with a given requirement, the other party may reasonably assume that absent notice to the contrary the requirement will not be insisted upon in subsequent cases. If a party intends to insist upon strict future compliance with previously ignored procedural requirements, clear

notice must be given. Where it acquiesces in, consents to or falls for a reasonable length to act upon rights of which it has full knowledge, it will be held to have waived such rights. Marasco Mfg. Co., 49 LA 817, 821 (Sembower, 1967).

The Arbitrator determines that even if we assume, arguendo, the Union's interpretation of Section 11.1 to be correct, under the circumstances here, the Union waived its right to insist upon a Joint Standing Committee meeting under Section 11. As the Union admitted, there have been cases in the recent past where Joint Standing Committees have been delayed for as long as three days after a suspension was imposed. There was also testimony to the effect that sometimes less than the full Joint Standing Committee would participate in what were supposedly Joint Standing Committee meetings and that in cases where employees were given disciplinary layoffs preceded by an investigation but without suspension for the balance of the shift, grievances were filed and processed under Section X, Grievance Procedure. The Union also agreed that Section 11.1 requirements might be waived when the Union deemed the employee actually guilty of the offense charged. It should be noted that at the time Grievant was notified of his suspension in the presence of the Chapel Chairman, neither he nor the Chairman asked for a Joint Standing Committee meeting. Nor was such a meeting requested by the Union President when the Grievance was filed the next day, although the Union claims it admonished the Company and accused it of not following procedure. The Union at the time wasn't specific as to what that procedural defect was. It wasn't until a week later that the Union testified that it raised the question of the Joint Standing Committee. The Arbitrator holds that under the circumstances the Company was not in violation of Section 11.1 in its dealing with and processing of Grievant's suspension.

AWARD

For the reasons stated above, the Arbitrator finds that the Company in neither respect violated the Agreement as alleged by the Union. The Grievance is herewith denied and dismissed.

It is so ordered.

UNITED TELEPHONE CO. OF FLORIDA—

Decision of Arbitrator

In re UNITED TELEPHONE COMPANY OF FLORIDA (Fl. Myers, Pl.)

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chose the first table because of expected air flow. The Arbitrator, having heard the evidence, is satisfied that the Company's designation of the first table as a no smoking table was not motivated by any anti-Union bias but rather was based on Mr. Ditch's opinion regarding probable air flow in the cafeteria.

The Union contends that the Company has no legitimate business reason, or purpose for designating the first table as a no smoking area. The Arbitrator, however, must reject this argument. Article IX - HEALTH AND SAFETY of the Agreement and the Occupational Safety and Health Act of 1970²⁹ require the Company to provide a healthy and safe working place for employees. The Company's failure to do so may, of course, expose it to liability under the Agreement, OSHA, and other sources and may produce additional sickness caused employee absenteeism. There does not exist, of course, any conclusive evidence that inhalation of tobacco-smoke polluted indoor air by a person not smoking (so called "passive smoking") is inherently unhealthy. Nonetheless, there is sufficient evidence of health risks from passive smoking to cause a prudent employer to attempt to avoid potential expenses from involuntary passive smoking by its employees.

Company Exhibit No. 3 summarizes a number of studies regarding the health effects of passive smoking.³⁰ Apparently reasonably well controlled studies have found increased risks of cancer, negative cardiovascular effects, and negative respiratory effects in persons chronically exposed to passive smoking. Correlation does not necessarily imply causation. In other words, the effects noted in the studies summarized in Company Exhibit No. 3 may have been caused not by passive smoking but by other factors. The possibility that other factors have produced the effect does not prohibit the employer from logically concluding that smoking may be a causative factor in producing the effects noted and attempting to reduce its potential liability from involuntary passive smoking.

In short, the Arbitrator finds that the Company's establishing the first table as a no smoking table serves a legitimate business purpose, that is, providing a healthy work environment and reducing potential expenses related to

possible passive smoking caused sickness.

Condition 4d of Subpart 15.02 is whether the change is reasonable in light of the interests of both sides to the Agreement. The Arbitrator is of the opinion and finds that designating the first table as a no smoking area change is reasonable in light of the interests of the Company and Union. The Union presents a significant interest. Anyone familiar with industrial situations is aware that despite the absence of reserved tables, it is not uncommon for employees to regularly sit at the same table. Certainly, it is not unreasonable for such employees to expect that they may continue conduct (in this case smoking) which has been permitted in such areas for many years.

Despite the seriousness of the Union's interests the Arbitrator is satisfied that the Company's action was not unreasonable. The Company presents the interest of maintaining a healthy work environment and minimization of its own expenses and potential liability. The change effected by the Company is not drastic. The cafeteria contains nine tables with spaces for eighty-eight chairs. The first table has spaces for ten chairs. There remain, therefore, eight tables with spaces for seventy-eight chairs. Finally, the Arbitrator is satisfied that designation of the first table as a no smoking area is reasonable in view of the probable air flow through the cafeteria. The Arbitrator has sufficient experience with air flow and ventilation to know that actual testing of air flow within the cafeteria might produce results different from that expected by Mr. Ditch. Nonetheless, the probability of that result is not sufficiently high for the Arbitrator to condition approval of the Company's change on an air flow test. In this regard it is especially significant that when normally closed doors are closed, it is highly unlikely that air would flow from any place in the cafeteria across the first table and out of the cafeteria. In short, in light of the interests presented by the Company and Union and in light of the limited inroads which the Company's change makes on the Union's interest, the Arbitrator finds that the Company's designating the first table as a no smoking area was reasonable.

Re: Openline

The Arbitrator may not decide in the present case whether the Company's Openline program violates the exclusive representation rights of the Union. The grievance involved in this case was referred to arbitration in accordance with Subpart 15.02 A of the Agreement

and not the "regular" arbitration procedures of Article XVI - ARBITRATION. As indicated above, Subpart 15.02 A states the purpose of such an arbitration and specifically limits the Arbitrator to answer certain questions regarding the change effected by the Company. If the Arbitrator were to answer other questions he would exceed the authority conferred on him by the Agreement. The Arbitrator will not do so.

Despite the above, the Arbitrator calls the attention of the parties to Dow Chemical Co.³¹ wherein the NLRB found "Speak Out", a program very similar to the Company's Openline program, to not violate §8(a)(5) of the National Labor Relations Act.³² On appeal the Third Circuit vacated the Board's order and remanded the case.³³ On remand the Board accepted the Court's decision.³⁴

In view of the above the grievance must be denied.

AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above Discussion, the grievance is denied.

FOWLERVILLE COMMUNITY SCHOOLS -

Decision of Arbitrator

In re FOWLERVILLE COMMUNITY SCHOOLS and FOWLERVILLE EDUCATION ASSOCIATION, AAA Case No. 54 39 1088 81, March 8, 1982
Arbitrator: Patrick A. McDonald

LAYOFF

- Probationary teachers - Deficiency in operating funds ► 111.60 ► 117.101 ► 100.55

School district's projected deficit for school year did not create substantial deficiency in its operating funds for purposes of permitting layoff of probationary teachers, under contract barring layoff of teachers unless there is substantial deficiency in operating funds of school district. Phrase "a sub-

stantial deficiency in operating funds of the school district" is interpreted to mean "an excess of expenditures over revenues taking into account any portion of the general fund equity which is unreserved."

- Probationary teachers - Termination v. layoff - Arbitrability ► 100.55 ► 117.103 ► 94.139 ► 111.60

Probationary teachers were not terminated but were placed on layoff status when employer notified them that they would be laid off from employment following review of anticipated revenues and expenditures and, therefore, grievance that was filed in protest of employer's action was arbitrable, under contract stating that termination of services for failure to reemploy probationary teacher shall not be basis of grievance. Notification to teachers did not state that their employment had been terminated but was clear in stating that they were placed on layoff status. Contract is equally clear that while employees do not accrue continuous service time during layoff, they are not terminated in terms of break in continuous service. Agreement requires school board to recall laid off teachers to vacancies as they might arise and this right of recall is not present in situation where employee has been terminated for other reasons, including discipline.

Appearances: For the employer - Joe D. Mosier, attorney. For the union - Susan Manierston, FEA/MEA Uniserve director.

PROBATIONARY TEACHERS

Facts

McDONALD, Arbitrator: - This dispute involves an interpretation of the collective bargaining contract between the parties and more specifically Article IX. The facts are not greatly in dispute. On January 6, 1981, the Fowlerville Board of Education, after reviewing and considering anticipated revenues and expenditures, notified six probationary teachers that they would be laid off from employment effective February 9, 1981. There is no question but that these notices met the contractual requirement of a thirty day notice.

As a result of that action, the grievance which is the subject matter of this dispute was filed by the Association on January 20, 1981, on behalf of five grievants who were probationary teachers. That grievance in relevant part states as follows:

The Board of Education voted to not run a deficit budget of \$69,000. By adopting budget cuts of \$99,000, over and above the necessary \$69,000, a violation of the contract has resulted. The Board has already shown where cuts could be made and can be further made before there exists a substantial defi-

²⁹ USC §651 et seq.

³⁰ Speech of James L. Repace to The New York Academy of Medicine, May 28, 29, 1981 entitled The Problem of Passive Smoking.

³¹ 215 NLRB 910 No. 139, 88 LRRM 1625 (1974).

³² 29 USC §158 (a)(5).

³³ *Stewards v. NLRB* (Dow Chemical Co.) 536 F.2d 350, 32 LRRM 2245 (4th Cir. 1976).

³⁴ 227 NLRB 1805 No. 153, 94 LRRM 1897 (1977).